Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Comment Sought on Scoping Document for Development of a Proposed Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act	)	WT Docket No. 13-240

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Louis P. Warchot
Senior Vice President-Law
and General Counsel
Timothy J. Strafford
Assistant General Counsel

The Association of American Railroads
425 3rd Street, S.W. Suite 1000
Washington, DC 20024
(202) 639-2502

Michele C. Farquhar
Deborah K. Broderson
Hogan Lovells US LLP

Counsel to the Association of American Railroads
555 13th Street, NW
Washington, DC 20004
(202) 637-5663

November 15, 2013

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Congress has mandated that a nationwide Positive Train Control ("PTC") network be fully operational on the nation's passenger and freight railroads by December 31, 2015, and to date the Association of American Railroads ("AAR") members have spent $3 billion of their own funds in an effort to meet this aggressive deployment deadline. The AAR's member railroads urgently need to install wayside communications poles on the railroads' rights of way to test and implement this nationwide interoperable safety technology. Accordingly, the AAR urges the Wireless Telecommunications Bureau of the Federal Communications Commission to expedite the adoption of a Program Comment by the Advisory Council on Historic Preservation ("ACHP") to exempt PTC and similar wayside poles from individual Section 106 review. Because of their small size, minimal area of direct and indirect impact, and location along previously disturbed industrial rail corridors, the potential effects of PTC and similar wayside poles on historic properties are foreseeable and minimal or not adverse. Consequently, the AAR believes that PTC and similar wayside poles qualify as an exempted category of undertaking pursuant to 36 C.F.R. Section 800.14(c) and do not merit individual review under Sections 800.4 through 800.6 of the ACHP's rules.

For those few PTC wayside poles that cannot be subject to exemption, the Program Comment should provide a process that will allow the prioritized batching of applications for review by rail corridor and rail subdivision, and will ensure that a challenge to a pole or poles in a batch is not allowed to slow the review process for the remaining, uncontroversial poles. The Program Comment should also establish a mechanism to clear rail subdivisions on a permanent basis for all wayside poles seventy-five feet or less in height, ensure the rapid resolution of any Section 106 consultation and, given the massive effort on the part of all stakeholders, allow these

route clearances to include collocation and construction in cleared subdivisions for all future wayside poles, regardless of the radio device or antenna used. Any Program Comment should adopt as best practices standard avoidance or mitigation protocols, review periods, and documentation requirements. The Program Comment should encourage consistency and transparency for consultative fees, and generally avoid monitoring given inherent safety risks. The goal of the Program Comment should be to respect both the sovereignty of the Tribal nations and states over their cultural resources and the integrity of the historic review processes while streamlining the approval of PTC wayside poles, given the minimal probability for an adverse impact to historic properties.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Comment Sought on Scoping Document for Development of a Proposed Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act	)	WT Docket No. 13-240

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

I. INTRODUCTION

The Association of American Railroads ("AAR")[1] respectfully submits these comments in response to the Public Notice released by the Wireless Telecommunications Bureau ("Bureau") of the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[2] In the *Public Notice*, the Bureau seeks comment in connection with the development of a proposed Program Comment to govern review of Positive Train Control ("PTC") wayside facilities construction under Section 106 of the National Historic

[1] The Association of American Railroads ("AAR") is a voluntary non-profit membership organization whose freight railroad members operate 82 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. More information on the AAR is available at our website, https://www.aar.org/Pages/Home.aspx.

[2] Comment Sought on Scoping Document for Development of a Proposed Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act, WT Docket No. 13-240, *Public Notice*, DA 13-1980 (WTB 2013) ("*Public Notice*"). The FCC also released a Public Notice attaching a substantively identical Scoping Document initiating and inviting government-to-government consultation with and input from federally recognized Tribal Nations. *See* CGB's Office of Native Affairs and Policy and WTB Release Scoping Document to Initiate Tribal Consultation on a Proposed Program Comment to Govern Review of Positive Train Control Facilities under Section 106 of the National Historic Preservation Act, WT Docket No. 13-240, *Public Notice*, DA 13-1985 (CGB/WTB 2013).

Preservation Act ("NHPA").[3] Specifically, the Bureau invites public input on the ideas the Bureau is considering for inclusion in the potential Program Comment, which are described in the attached Section 106 Scoping Document ("Scoping Document").

As detailed below, PTC is a significant rail public safety initiative requiring the installation and extensive testing of new wireless train-monitoring technology, with final system implementation mandated by Congress by December 31, 2015. The AAR respectfully submits that a Program Comment is required to meaningfully streamline the review of thousands of new radio-hosting wayside facilities across the nation, including infrastructure that is integral to the deployment of PTC as well as related small-scale equipment that will fall outside of the specific PTC mandate but will serve a similar public safety function and require the installation of structurally similar equipment. The AAR urges the FCC to use its broad authority pursuant to the NHPA and the regulations of the Advisory Council for Historic Preservation ("ACHP") to encourage the ACHP to exempt most PTC wayside poles from Section 106 review, and to clarify that the alternate procedures in the Program Comment are applicable to all wayside poles on the railroad rights of way that perform a similar public safety function and satisfy the same criteria as the PTC poles described below.[4]

Specifically, the Bureau should draft the Program Comment to include a blanket exemption from Section 106 review for all PTC and structurally similar wayside poles located on

[3] *See Public Notice* at 1.

[4] As drafted by the Bureau, the Scoping Document only addresses PTC wayside poles and does not include the 3,000-4,000 PTC base station poles that it estimates will be approximately 100-150 feet in height. *Public Notice*, Scoping Document at 3. However, several of the AAR member railroads plan to deploy at least some of their base station antennas on the shorter PTC wayside poles, where they would be collocated with other PTC equipment. The size of these wayside poles would be identical to those contemplated for inclusion in the Program Comment. The Bureau should confirm as part of the Program Comment that covered undertakings exempted from the Section 106 review process include PTC base station antennas that are collocated on PTC wayside poles, as well as non-PTC radios located on poles otherwise identical to PTC installations.

railroad rights of way that will have foreseeable, minimal effects on historic properties.[5] As an initial matter, the Commission should clarify that all areas that have been previously designated by a Tribal Historic Preservation Officer ("THPO") or State Historic Preservation Officer ("SHPO") as having limited potential to affect historic properties are exempted from Section 106 review. The Bureau should work with the ACHP to draft the Program Comment to additionally exempt from Section 106 review all PTC poles and structurally similar wayside poles located on railroad rights of way that are not immediately adjacent to any previously recorded historic properties. The ACHP has the clear authority to exempt undertakings from Section 106 review, and as a Federal agency the FCC can adopt alternate Section 106 procedures immediately upon their approval by the ACHP.

If conditions are identified that preclude exemption for some small number of PTC wayside poles, the Program Comment should establish a process that will: (i) expedite review of poles by allowing applications to be batched by rail corridor, rail subdivision, and priority of deployment; and (ii) ensure that concerns about individual poles are not allowed to interfere with the timely approval of other PTC wayside poles included in a given batch.[6] The Bureau should also establish a mechanism to enable the rapid completion of consultation, and additionally craft best practices for review periods and documentation requirements. Although the ACHP has

[5] In the Order adopting the Nationwide Programmatic Agreement, the FCC uses the terms "exemption" and "exclusion" interchangeably. *See, e.g.*, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Review Process, *Report and Order*, 20 FCC Rcd 1073, 1086-87 ¶ 34 (2004) ("*NPA R&O*") (using both terms to describe the same potential waiver of Section 106 review for an undertaking). The ACHP's regulations similarly use these terms with some flexibility. *See, e.g.* 36 C.F.R. §§ 800.14(c)(1), (c)(6). Regardless of the term used, the AAR believes that the guidelines provided in Section 800.14(c) of the ACHP's rules are clear: when consistent with the NHPA, undertakings with effects on historic properties that are foreseeable and likely to be minimal or not adverse should not be subject to further Section 106 review. *See* 36 C.F.R. §§ 800.14(c)(1)(i)-(iii).

[6] A railroad division is a length of track under the direction of one supervisor; a subdivision is a portion of a division that can be covered by a crew in a single day. Based on variations in track topography and railroad operating systems, the length of rail subdivisions can vary. An interactive map of rail subdivisions in the United States is available at: http://fragis.fra.dot.gov/gisfrasafety/.

clearly found that consultative fees are rarely appropriate,[7] the FCC might also establish best practices regarding consistent and transparent consultative fees that would be applicable under limited circumstances, and should encourage standard avoidance or mitigation protocols as best practices.

The AAR and its members acknowledge and respect Tribal sovereignty, as well as the important interest that THPOs and SHPOs have in protecting historic and cultural resources, and are committed to working in good faith to address all parties' legitimate concerns. It is the AAR's hope that the relationships forged during this period can continue and grow, and contribute to greater cooperation and understanding that will benefit Tribal Nations, the States, and industry. We note that the PTC wayside poles are significantly smaller in height than the cellular and other communications towers to which THPOs and SHPOs may be accustomed, and respectfully submit that these poles, when deployed on a railroad right of way, pose a foreseeable, minimal risk to historic properties. The AAR believes that a Program Comment would accommodate an important national safety initiative while being protective of the interests of all potentially affected communities and minimizing the burden on THPOs and SHPOs of Section 106 review of applications that are not relevant to their consultative interests.

II. BACKGROUND

The FCC has a long history of involvement with rail industry radio communications, and recognizes the industry's particular needs to minimize interference and protect public safety through exclusive spectrum licenses. In particular, the FCC has been familiar with the PTC

[7] *See infra* Section V.

mandate for several years, having first approved the industry's acquisition of licenses in the 220-222 MHz band to be solely used for this initiative in 2008.[8]

PTC, as an unfunded public safety mandate with an imminent deployment deadline, has had an enormous financial and administrative impact on the railroads. The railroads have already spent roughly $3 billion of their own funds on PTC development and deployment in an attempt to meet the December 31, 2015 statutory deadline.[9] Although this burden has been significant, the AAR and its members recognize the important public safety function of PTC and are committed to working with the FCC to finalize review of PTC wayside poles. Given the increasing challenge of meeting the statutory deadline, the AAR urges the Bureau to draft and submit for ACHP adoption a comprehensive Program Comment and approve all PTC wayside poles for construction as quickly as possible.

As the FCC noted in the Scoping Document, PTC wayside poles will be between twenty-five and seventy-five feet in height (including the antenna), and installed approximately every one to two miles apart in the existing railroad bed alongside existing tracks, and at certain switch points and other operational sites.[10] Some railroads plan to deploy fixed poles for PTC, while

[8] *See Request of PTC-220, LLC for Waivers of Certain 220 MHz Rules*, Memorandum Opinion and Order, 24 FCC Rcd 8537, 8537 (2009) (noting that PTC-220, a joint venture of Ekanet, Inc. (a subsidiary of Union Pacific Corporation) and Norfolk Southern Railway Company (a subsidiary of Norfolk Southern Corporation) acquired twelve 220 MHz licenses in June 2008).

[9] *See* Testimony of Edward R. Hamberger, President & Chief Executive Officer, AAR, before the U.S. Senate Committee on Commerce, Science, and Transportation, *Hearing on Rail Safety*, 5 (June 19, 2013), *available at* http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=fc4fe590-9862-4121-843c-4783f5a2fdc6 (last accessed Nov. 10, 2013).

[10] *See Public Notice*, Scoping Document at 1. No PTC wayside pole is anticipated to exceed sixty-five feet in height, although some PTC antennas may extend from the top of the pole an additional five feet, bringing the total height from the base of the pole to the top of the antenna to slightly over seventy feet. To ensure that the Program Comment addresses all PTC wayside poles, the AAR recommends that its provisions encompass poles of seventy-five feet or less in total height.

others will deploy tilt, or fold-over, structures.[11] All of the railroads plan to use side-mounted antennas that will not add more than five feet to the height of the poles. Depending on the pole's height, soil conditions, and safety regulations, the poles will generally be installed at a depth ranging from five to ten feet, with a depth of up to fifteen feet required in a few limited situations, with foundation holes varying from twelve to fifteen inches in diameter.[12] Generally, installation of the PTC wayside poles will be conducted by a mechanical arm extending from equipment travelling either on the rail track or on an existing access road.[13] PTC poles will be placed, with minimal disturbance, in the ballasted roadbed of the railroad on ground that has previously been subject to extensive industrial development.[14] In addition, no removal of vegetation or trees will be necessary, as these typically have already been cleared from the railroad rights of way.

The AAR appreciates the FCC's efforts to date regarding the deployment of PTC infrastructure, which are recounted in the Public Notice. To improve the precision of the record, the AAR would like to correct two small factual inaccuracies. In the Public Notice, the Bureau correctly observes that to meet the PTC statutory mandate, the railroads are preparing to install more than 20,000 wayside poles nationwide on the railroad rights of way alongside existing tracks.[15] However, the Bureau understates the urgency of FCC approval of PTC wayside

---

[11] *See* Appendix A for illustrations of typical PTC poles. To view a video of the installation of a PTC pole, *see* http://link.brightcove.com/services/player/bcpid2838866340001?bckey=AQ~~,AAABBi3njEk~,fXHlbhahFU1u3i4MqoeRtrOO3Cqddykq.

[12] *See Public Notice,* Scoping Document at 1-2.

[13] *See id.* at 3. Few, if any, roads will be built to facilitate PTC wayside pole installation.

[14] *See id.*

[15] *See Public Notice,* Scoping Document at 1. Because some PTC antennas will be collocated, the total number of antennas installed nationwide will be slightly higher than the number of PTC wayside poles that must be installed.

infrastructure when it claims that "railroads have stated that they must begin general deployment of these facilities by early 2014."[16] In fact, the railroads have repeatedly advised the Commission, starting in early 2013, that timely deployment of PTC infrastructure is necessary to have any hope of even partially satisfying the statutory deadline. In addition, although the Commission suggests that it first became aware of the enormity of the problem of the timely review of PTC infrastructure in May 2013, it was widely known before then that the vast majority of PTC antennas and corresponding infrastructure would not be able to be collocated on existing facilities, but would require the installation of new infrastructure on the railroad rights of way that could be subject to Section 106 review.

Throughout the PTC deployment process the railroads have attempted to comply with the FCC's procedures for requesting Section 106 review for communications towers. Although the Tower Construction Notification System ("TCNS") was adopted as a "voluntary" system,[17] in the spring of 2013 the FCC initially advised AAR members to enter towers through that system to complete Tribal consultation. After the entry of fewer than three hundred planned PTC pole installations into TCNS, however, the FCC informed the railroads that its system was incapable of processing the quantities of entries anticipated for the nationwide deployment of PTC wayside poles, and advised the AAR and its members to cease all submissions for Tribal review and consultation through TCNS and effectively stopped implementation of PTC until the FCC could devise a mechanism that could handle thousands of pole applications. The railroads have been left for over six months with no way to comply with Section 106 in a timely manner.

---

[16] *Id.*

[17] *See* FCC Announces Voluntary Tower Construction Notification System to Provide Indian Tribes, Native Hawaiian Organizations, and State Historic Preservation Officers with Early Notification of Proposed Tower Sites, *Public Notice*, DA 04-270 (Feb. 3, 2004).

Recent events and bureaucratic delay are extending this situation and adding to the challenge of the timely deployment of PTC infrastructure. In October 2013, the government shutdown led to the postponement of a scheduled FCC consultative meeting with Tribal authorities in Tulsa, Oklahoma and delayed an additional meeting scheduled for November 2013 in Rapid City, South Dakota.[18] While earlier FCC staff statements to the rail industry in May 2013 and to the ACHP in July 2013 suggested that the Program Comment would be drafted with the goal of approval by the ACHP by December 2013, this deadline has also slipped. The Scoping Document and Public Notice seeking comments for the development of the Program Comment were not issued until September 27, 2013, and the Bureau has now estimated an ACHP vote in late March 2014. These unanticipated delays in the consultative process further threaten the possibility of satisfying the Congressional PTC mandate, and add to the urgency of quickly drafting and implementing a Program Comment that exempts PTC facilities and similar wayside poles from individual review consistent with the requirements of 36 C.F.R. Sections 800.14(c) and (e). In particular, given the massive effort involved in the review of PTC wayside poles on the part of the FCC, SHPOs, THPOs and the railroads, the exemptions in the Program Comment should be permanent and encompass all wayside poles that are seventy-five feet and under located on the railroad rights of way in cleared rail subdivisions, regardless of the technology employed on the pole.

[18] These meetings have been rescheduled, with the Rapid City meeting now slotted for late November 2013 and the Tulsa meeting scheduled for mid-December 2013, and additional consultative meetings in Portland, Oregon, Albuquerque, New Mexico, and/or a location in California proposed by the FCC to take place in January-February 2014.

III. THE PROGRAM COMMENT SHOULD EXEMPT PTC AND SIMILAR WAYSIDE POLES FROM SECTION 106 REVIEW

The NHPA provides that the ACHP "shall promulgate regulations or guidelines…under which Federal programs or undertakings may be exempted" from Section 106 review when an exemption is determined to be consistent with the NHPA, "taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties."[19] Section 800.14 of the ACHP's rules provides that a program alternative, including a Program Comment, may be developed by either a federal agency or the ACHP and substituted for the process set out in the ACHP's rules regarding Section 106 review as long as the new procedures are consistent with the ACHP's regulations and the NHPA.[20] An exemption for PTC wayside poles would be consistent with the purposes of the NHPA, which establishes as Federal policy the use of measures "to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."[21]

Moreover, as the FCC has previously observed, exempting undertakings from Section 106 review can actually serve to enhance the historic preservation process by conserving the resources of the Commission, SHPOs, THPOs and the ACHP, allowing them to invest limited resources in the review of the rarer and more important cases with actual potential to adversely impact historic properties.[22] Nor is the Section 106 process intended to be exhaustive. The

[19] 16 U.S.C. § 470v.

[20] *See* 36 C.F.R. § 800.14(a).

[21] 16 U.S.C. § 470-1(1); *see also* Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System, 70 Fed. Reg. 11928, 11929 (Mar. 10, 2005) ("Interstate Highway System Exemption").

[22] *See NPA R&O*, 20 FCC Rcd at 1087 ¶ 35. During the negotiation of the NPA, one SHPO noted that a survey conducted in his state found that 97 percent of Section 106 reviews of communications towers

Commission has noted that in exempting some undertakings from Section 106 review, the NHPA "contemplates a balancing of the likelihood of significant harm against the burden of reviewing individual undertakings" and "does not require perfection in evaluating the potential effects of an undertaking in every instance."[23]

The ACHP regularly approves broadly crafted exemptions from Section 106 review for undertakings affecting national transportation or utility corridors, and an exemption is especially appropriate here to facilitate the installation of critical, Congressionally mandated public safety infrastructure on the rights of way alongside existing railroad tracks.[24] An exemption will ensure that this transportation corridor continues to serve its vital role in safely moving freight and passengers across the country, while providing for consultation and historic review of the minimal number of unique, historically significant properties. Especially where the potential impacts are foreseeable and minimal or not adverse, the AAR respectfully submits that it would be appropriate for the FCC and ACHP to exercise their ability to exempt PTC wayside poles from Section 106 review, given the serious consequences for all stakeholders. Failing to exempt this undertaking would impose needless burdens on the resources of THPOs, SHPOs, and the railroads, hamper the ability of the railroads to comply with the deadlines contained in the

---

resulted in findings of "no effect," and other states' SHPOs reported similar findings. *See* Comments of PCIA—the Wireless Infrastructure Association, WT Docket No. 03-128, 32 (filed Aug. 8, 2003).

[23] *NPA R&O*, 20 FCC Rcd at 1087 ¶ 35.

[24] *See, e.g.*, Interstate Highway System Exemption, 70 Fed. Reg. at 11928 (exempting Federal agencies from taking into account the effects of their undertakings on the Interstate Highway System, with exceptions for certain historically significant elements or structures); Exemption Regarding Historic Preservation Review Process for Projects Involving Historic Natural Gas Pipelines, 67 Fed. Reg. 16364, 16364 (Apr. 5, 2002) (exempting from Section 106 review the effects of undertakings on historic natural gas pipelines); *see also* Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges, 77 Fed. Reg. 68790, 68794 (Nov. 16, 2012) (exempting from Section 106 review undertakings on certain common highway bridges, absent the close proximity of properties eligible for or listed on the National Register) ("Concrete and Steel Bridges Program Comment").

Congressional PTC deployment mandate, and ultimately harm the public interest by delaying a critical safety program available to all communities in a timely manner.

In keeping with the review process contemplated in the Scoping Document, the FCC should work with the ACHP to draft the Program Comment to broadly exempt from Section 106 review PTC or related wayside poles that are seventy-five feet and under, constructed on the railroad rights of way, and not within or immediately adjacent to a known, previously recorded historic property.[25] For the avoidance of doubt, the Program Comment should be technology-neutral, and clarify that an exempted pole may support either wayside or base station radios. Given the large scale and urgency of PTC and related infrastructure deployment, the underlying public safety function, and the minimal potential for negative effects on historic properties, Section 106 review for PTC and similar wayside poles should be required only in limited circumstances.

A. All areas previously designated by SHPOs and THPOs as having limited potential to affect historic properties should be exempt from Section 106 review.

As an initial matter, the Program Comment should clarify that all areas—if any such areas exist—that have been previously designated by a SHPO or THPO as having limited potential to affect historic properties should be exempt from further Section 106 review.[26]

---

[25] The NPA provides an exemption from Section 106 review for poles less than 200 feet in height located in industrial parks. All PTC wayside poles will be located on railroad rights of way which are largely industrial corridors and will be significantly less than 200 feet in height. *See infra* Section III.B.

[26] *See* 47 C.F.R. Part 1, App. C—Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process at Section III.F ("NPA"). In October 2004, the FCC and the United South and Eastern Tribes, Inc. ("USET") adopted Voluntary Best Practices for Section 106 review of communications towers, which included a commitment by the FCC to "modify the TCNS so that a Tribe may further limit its areas of interest by indicating a more detailed description of non-interest areas within the designated counties" of interest. *See* FCC and USET, "Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act," 3 (Oct. 25, 2004) ("Voluntary Best Practices"). The AAR asks the FCC to confirm in the Program Comment that this change was in fact made to TCNS to enable Tribal Nations to register areas of exemption that can be communicated to applicants.

Although this requirement was established in 2004 by the Commission as part of the Nationwide Programmatic Agreement ("NPA"), in practice information regarding these previously-exempted areas has not been freely available despite the NPA's provision that such designations "be documented by the SHPO/THPO and made available for public review."[27] The railroads need access to this information because the NPA explicitly provides that undertakings that have been exempted from review, including those designated by SHPOs and THPOs as having limited potential to affect historic properties, should not be submitted for any further Section 106 review.[28] Access to information regarding these existing exemptions prior to the preparation and submission of applications for review will save time and resources not only for the railroads as applicants, but also for the Commission and SHPOs and THPOs who could otherwise be asked to review hundreds or thousands of unnecessarily submitted applications.[29]

To ensure that the railroads have access prior to finalizing their tower construction applications to information regarding areas that have already been exempted by SHPOs and THPOs from Section 106 review, the Bureau should establish in the Program Comment a process for efficiently aggregating and transmitting this data. The railroads currently are unable to access any public information regarding which THPOs, in particular, have determined that they do not wish to be consulted for specific rail corridors, or conversely which THPOs have expressed an active interest in being consulted for such areas. Likewise, it is difficult to determine whom to approach to obtain this critical information. Given this current inaccessibility of information regarding exemption areas, despite the clear requirement in the

[27] *NPA* at Section III.F.

[28] *See id.* at Section III.

[29] USET has described how Tribal Nations struggle under the annual burden of reviewing hundreds, or even thousands, of communications tower applications. *See* Comments of USET, WT Docket No. 03-128, 3 (filed Aug. 8, 2003).

NPA, the AAR recommends that the Bureau assume the role of an intermediary in compiling and organizing data regarding exemption areas, batched by rail corridor or rail subdivision, and making a unified exemption database available to the railroads. Absent access to this information, the railroads run the risk of running afoul of the terms of the NPA by submitting for review PTC wayside poles that should not be subject to Section 106 processing.

In addition to those areas that are completely exempt from further review by THPOs because they are of no Tribal interest, the FCC should also consult with Tribal authorities and ascertain those areas where a Tribe seeks to be contacted only if archeological resources are found in the course of pole installation, and exempt these areas from any pre-construction Section 106 review. At least one railroad reports that, in response to a previous entry for Section 106 review submitted through TCNS, it received requests from Tribal authorities that clarified that the Tribes' only actual consultative interest would be in the event of an archeological discovery.[30] The NPA provides that an applicant that begins construction and discovers a previously unidentified site that may be an historic property must promptly notify the Commission and appropriate SHPO or THPO, and cease all construction until an evaluation has been completed, and the railroads understand and will respect this obligation.[31] By exempting these areas from further Section 106 review, absent the discovery of a previously unidentified site that might be a historic property, the FCC would additionally streamline the Section 106 process and ensure that Tribal authorities and SHPOs are not unintentionally flooded with applications that are not relevant to their consultative interests.

[30] *See* Letter from Theodore K. Kalick, Senior U.S. Regulatory Counsel, Canadian National Railway, to Stephen G. DelSordo, Federal Preservation Officer, Federal Communications Commission, "Evaluation of Railroad Wayside Facilities," 6 (May 9, 2013) ("Kalick Letter"), attached as Appendix B.

[31] *See* NPA Section IX; *see also* 36 C.F.R. § 800.13; 47 C.F.R. § 1.1312(d).

B. PTC and similar wayside poles on railroad rights of way that are not adjacent to previously recorded historic properties should be exempt from the Section 106 review process.

In addition to any areas that have already been definitively exempted from Section 106 review by SHPOs and THPOs pursuant to the NPA, the Program Comment should clarify that PTC wayside poles and other structurally similar poles not directly deploying PTC technology pose only a minimal and foreseeable risk of affecting historic properties and so do not need to undergo further review. Specifically, in drafting the Program Comment the Bureau should specify that all PTC wayside poles that: (1) are seventy-five feet or less in height; (2) are located on a railroad right of way; and (3) will not be installed within 500 feet of a property that is listed, or previously determined to be eligible for listing, in the National Register (other than the railroad tracks themselves) or on Tribal lands, are exempt. To the extent that construction of PTC wayside poles qualify as undertakings, such an exemption is consistent with Section 800.14(c), as the potential effects of PTC wayside pole deployment are reasonably foreseeable and minimal or not adverse, and additionally minimizes the regulatory burden and review effort by the FCC, SHPOs/THPOs, and the ACHP. Exempting short PTC and other related wayside poles that are located along otherwise undistinguished, heavily trafficked industrial corridors with no adjacent previously recorded historic properties is a reasonable approach to satisfying the requirements of the NHPA consistent with applicable and controlling precedent, while expediting PTC deployment pursuant to statutory mandate.

As an initial matter, the exceptionally small size of PTC wayside poles within the already visually compromised existing railroad rights of way, especially when compared to traditional communications towers, ensures that any direct visual effects on historic properties are foreseeably minimal. The NPA already provides an exemption for communications towers

located in industrial parks that are as tall as 200 feet in height, noting that a tower of that size "is ordinarily unlikely to have significant incremental effects on historic properties" within previously developed areas.[32] At a maximum height of seventy-five feet, the PTC wayside poles would be considerably smaller than the exempted industrial park towers, and would be closer in height to standard utility poles that are already ubiquitous in the urban and rural landscape. Like the significantly taller poles exempted from Section 106 review by the NPA, the PTC wayside poles will be located mainly along industrial corridors already well developed in many areas with similarly sized vertical elements, will be consistent with current land usage and infrastructure, and pose a minimal risk of visual effects on any historic properties.[33]

The location of the PTC wayside poles on the railroad rights of way minimizes the risk of any direct or indirect physical effects on historic properties. Railroad tracks form industrial corridors along narrow, heavily travelled tracts of land that have historically been lined with poles carrying telegraph wires, and later telephone and other communication services.[34] In creating an exemption for utility corridors in the NPA, the Commission noted that the increasing deployment of wireless services on smaller poles located near similar existing poles would pose a minimal danger of adverse impact on historic properties.[35] The PTC wayside poles covered here will all be located in ground on the established rail corridor, which in most cases has been

[32] *See NPA R&O*, 20 FCC Rcd at 1094 ¶ 55.

[33] Under the Interstate Commerce Commission Termination Act ("ICCTA"), *see infra* at Section III.C, the railroads are not subject to local zoning requirements. *See, e.g., Norfolk Southern Ry Co., et al. v. City of Austell, et al.*, 1997 WL 1113647 (N.D. Ga. 1997) (holding that a municipal zoning ordinance, as applied to the construction and operation of a railroad intermodal facility, was preempted under Section 10501 of the ICCTA).

[34] *See Public Notice*, Scoping Document at 5 ("[S]ome SHPOs have told the FCC that they consider railroad lines to be industrial corridors and that they expect active construction and installations in disturbed areas within these corridors.").

[35] *See NPA R&O*, 20 FCC Rcd at 1098 ¶ 63.

subject to continuous disruption at various depths through construction and industrial traffic for nearly one hundred and fifty years.[36]

Based on the highly developed and disrupted nature of the railway rights of way, the Program Comment should exempt from Section 106 review any PTC wayside pole located on a railroad right of way where the installation site is more than 500 feet from any known historic property[37] other than the railroad tracks themselves.[38] To ensure adherence to this standard, the Program Comment could clarify that applicants are required to make a determination of whether any historic properties are adjacent to the proposed PTC wayside pole site by consulting the National Register and the list of properties formally determined to be eligible, and by consulting available records regarding other properties considered eligible, such as those in the possession of the relevant SHPO/THPO, as appropriate.[39] As long as there is no recognized or eligible historic property located within a 500 foot radius of the PTC or structurally similar wayside pole site, the installation of such a pole poses little risk to any of the structures or areas intended to be the subject of protection and preservation by the NHPA.

Finally, the Program Comment should provide that PTC and similar wayside poles satisfying the other elements for exemption should not be subject to Section 106 review with

---

[36] *See id.* at 1097 ¶ 62 ("[T]he existence of…modern intrusions [such as highways and passenger railways] reduces the risk that a new communications facility would impose an additional adverse effect on historic properties.").

[37] In the adopting the NPA, the ACHP approved an exemption for poles of less than 200 feet in height located on industrial or commercial properties that are located at least 500 feet from a property that is listed or eligible for listing in the National Register. *See id.* at 1094-95 ¶ 56. We propose adopting this protected radius of 500 feet here to allow for sufficient protection for historic properties.

[38] Although in some places railroad properties may be at least fifty years old, and thus technically may be eligible for inclusion in the National Register, tracks and other industrial infrastructure on the railroad rights of way are ubiquitous and utilitarian. As the effect of PTC wayside pole deployment on the tracks themselves will be foreseeable and non-adverse, the eligibility of any undistinguished railroad property for the National Register should not be a factor in granting a broad exemption for the installation of PTC wayside poles.

[39] *See NPA R&O*, 20 FCC Rcd at 1094-95 ¶ 56.

respect to their potential impact on previously undisturbed soil, as this should not be a factor for the historic review of PTC wayside poles. All railroad rights of ways have been subject to heavy and regular maintenance for the life of the track bed. The original construction of the railroad involved flattening hills, filling valleys and straightening curves to build a level rail bed, with ballast installed on top to secure the railroad track and ties. Throughout their history, the railroads have routinely undertaken maintenance and undercutting activity on the entire rail system to ensure that the rail ballast is secure and properly drained. While modern undercutters are efficient machines that usually do not penetrate the ground by more than several feet, historically undercutting was performed by much less precise heavy machinery, including bulldozers, or by manual laborers using shovels. Field supervisors typically did not record the location of track maintenance and undercutting work at specific locations, as GPS technology has not existed for most of the history of the railroads.[40] In areas of track where the soil is soft or clay-based, significant drainage facilities have also had to be implemented and maintained, requiring the installation of pipes and the digging of culverts. In addition to the long history of disturbance on the rights of way by the railroads themselves, the laying of fiber optic cables and other utility infrastructure has resulted in significant development of land along the national rail bed.

Although the railroads believe that the likelihood of encountering any historic or cultural resources during the course of construction is minimal, they have committed to honor all existing FCC rules in this regard during the PTC deployment process. The NPA provides that an applicant that discovers during the course of an undertaking a previously unidentified site that may be a historic property must promptly notify the Commission, the SHPO/THPO and any

[40] GPS was not widely adopted for railroad field work until the mid- to late 1990s.

potentially affected Tribal authority, and must cease any construction that is underway until the site can be evaluated, and the railroads understand and will follow this procedure.[41] In addition, the railroads pledge to take reasonable and immediate steps to protect any site where artifacts have been found from environmental destruction, vandalism, and/or theft, and to protect the confidentiality of the site.

C. The ACHP has the clear authority to exempt undertakings from Section 106 review through a Program Comment, and the FCC can rely on these procedures without a rulemaking.

Under the NHPA, the ACHP has the authority to exempt undertakings by adopting a program comment, and the FCC can rely on these exemptions without amending its environmental review rules. Doing so would also enable the FCC to harmonize its processes with the Surface Transportation Board's ("STB") jurisdictional grant over transportation by rail carrier,[42] and the Federal Railroad Administration's ("FRA") jurisdictional grant over railway safety matters.[43]

As the FCC has previously noted, Section 214 of the NHPA permits the ACHP to exempt from Section 106 review classes of federal undertakings that would be unlikely to impact historic properties.[44] For example, in 2005 the ACHP adopted an exemption that released all Federal agencies from the Section 106 requirement of having to take into account the effects of their undertakings on the interstate highway system, except for a limited number of individual

---

[41] *See* NPA at Section IX.A.

[42] *See* 49 U.S.C. § 10501 (granting the STB exclusive jurisdiction over "transportation by rail carriers").

[43] *See* 49 U.S.C. § 20103 (giving the FRA plenary authority over "every area of railroad safety").

[44] *See NPA R&O*, 20 FCC Rcd at 1086 ¶ 33; *see also* 16 U.S.C. § 470v (authorizing the ACHP to promulgate regulations under which Federal undertakings may be exempted from the requirements of the NHPA "when such exemption is determined to be consistent" with that statute, "taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties").

highway elements that were found to have particular national significance.[45] More recently, the ACHP adopted a program comment that exempted from Section 106 review undertakings potentially affecting thirteen distinct categories of post-1945 concrete and steel highway bridges, based on their shared characteristics and their limited value for historic preservation.[46] In contrast, at issue here is a more modest, narrowly-focused exemption for small communications towers located on railroad rights of way. Critically, the ability to approve a program comment lies *exclusively* with the ACHP, not with the FCC or any other Federal agency.[47] Although in this case the FCC has requested that the ACHP provide its comment on the Section 106 review of PTC deployment, the ACHP could also have chosen to adopt alternative procedures for this undertaking on its own, and informed the FCC of its determination as to the suitability of exemptions at the resolution of its self-generated review process.[48]

Moreover, regardless of the specific provisions contained in the final Program Comment, the FCC can rely on any program alternative adopted by the ACHP without undertaking a rulemaking proceeding. The ACHP's rules explicitly provide that program alternatives allow Federal agencies to streamline their Section 106 review processes by adopting procedures that do not have to go through the formal rulemaking process.[49] Once a program alternative, including a Program Comment, has been approved by the ACHP, "the agency official may adopt" the

---

[45] *See* Interstate Highway Exemption, 70 Fed. Reg. at 11928.

[46] *See* Concrete and Steel Bridges Program Comment, 77 Fed. Reg. at 68791. In adopting the NPA, the ACHP also carved out numerous exemptions for tower enhancements, replacement towers, temporary facilities, industrial and commercial properties, towers on or near communications and utility rights of way, and areas specifically exempted by a SHPO or THPO. *See NPA R&O*, 20 FCC Rcd at 1086-1099 ¶¶ 33-68.

[47] *See* 36 C.F.R. § 800.14(e).

[48] *See id.*; *see also* 36 C.F.R. § 800.14(c).

[49] *See* 36 C.F.R. § 800.14(a); *see also* ACHP, "Program Alternatives," *available at* http://www.achp.gov/progalt/ (last accessed Nov. 1, 2013).

program alternative "as *final* alternate procedures."[50] Although the FCC adopted the NPA as part of a formal rulemaking process, it was not necessary to do so, as the ACHP's rules provide that a programmatic agreement takes effect "when executed by the [ACHP], the agency official, and the appropriate SHPOs/THPOs."[51] In fact at the time the NPA was being negotiated, the ACHP expressed concern over the FCC's decision to adopt that program alternative through a time-consuming and unnecessary rulemaking proceeding.[52] Ultimately a program alternative, such as the Program Comment, does not change the FCC's environmental rules, but instead modifies the *ACHP's* rules based on the review and approval undertaken by the ACHP itself. It is unnecessary for the FCC to seek public comment on a change to another agency's regulations.[53] A search of recent program alternatives approved by the ACHP for other Federal agencies did not reveal any that were formally adopted through a rulemaking proceeding.[54]

---

[50] 36 C.F.R. § 800.14(a)(2) (emphasis added).

[51] 36 C.F.R. § 800.14(b)(2)(iii).

[52] *See, e.g.*, E-mail from John Fowler, Executive Director, ACHP to John Clark et al. re: Negotiations on the NPA, WT Docket No. 03-128, 1 (filed Feb. 20, 2004) ("We both agree that [the NPA] negotiation process has been hampered by the FCC's insistence on doing a rulemaking."); Letter from John M. Fowler, Executive Director, ACHP to Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division, FCC, WT Docket No. 03-128, 1 (filed Feb. 24, 2004) ("FCC's decision to move forward with a rulemaking to embody the terms of the [NPA] imposed severe restrictions on the access of non-signatories, in particular industry and the tribal representatives, to the revised [NPA], further impeding consultation on the entire document. In addition, FCC set a timetable for consideration of the rulemaking by Commission members that has added one more burden to an already difficult process.").

[53] The FCC's environmental review regulations reference both the ACHP's rules and the rules governing eligibility for the National Register, *see* 47 C.F.R. § 1.1307(a)(4), but the Commission does not amend its rules each time those other regulations are amended.

[54] The Administrative Procedure Act requires agencies to publish notice of proposed rulemakings in the Federal Register. See 5 U.S.C. § 553(b). However, the following sampling of programmatic agreements were negotiated by Federal agencies and the ACHP but were not subject to a rulemaking proceeding published in the Federal Register: Programmatic Agreement Among the Federal Highway Administration et al. Regarding Compliance with Section 106 of the NHPA, as It Pertains to the Administration for the Federal-Aid Highway Program in California, 13 (2007), available at http://www.dot.ca.gov/ser/vol2/PA_04-EH.pdf (last accessed Nov. 5, 2013) (noting that the agreement took effect following execution by the Federal Highway Administration, the SHPO, the ACHP, and the California Department of Transportation); see also Programmatic Agreement among the U.S. Dept. of Agriculture Rural Utilities Service et al. for the Broadband Technology Opportunities Program and

In addition to being unnecessary, a formal rulemaking would also be redundant. The purpose of the informal administrative rulemaking process is to ensure that Federal agencies invite public comment on regulations prior to their adoption.[55] But the program alternative process is explicitly set up to invite public comment, both in consultation prior to the final draft of the document, and after, when the Program Comment has been submitted to the ACHP for review. Specifically, notice of any alternate procedure must be published in the Federal Register, and the ACHP's rules require that the Federal agency seeking a program comment, or the ACHP itself if initiating a program comment, must "arrange for public participation appropriate to the subject matter and the scope of the category," and summarize any views submitted by the public.[56]

Even if the FCC decides to seek additional public comment on the effect of exempting certain undertakings with no negative effect on historic properties located on railroad rights of way from the Section 106 process, the agency could begin relying on the Program Comment process prior to the resolution of the rulemaking process under the NHPA and the rules of the ACHP. Once the ACHP has reviewed and approved proposed alternative procedures, its rules require that it notify the affected agency, and inform the appropriate agency official that the

---

Broadband Initiatives Program (2009), available at http://www.achp.gov/docs/PA_Nationwide_RUS.pdf (last accessed Nov. 5, 2013); Programmatic Agreement among the U.S. Dept. of Agriculture National Resources Conservation Service et al. Relative to Conservation Assistance (2002), available at http://www.achp.gov/docs/PA_NRCS_Nationwide.pdf (last accessed Nov. 5, 2013). In addition, a search of the Code of Federal Regulations found the only programmatic agreements included in a Federal agency's rules are the NPA and the FCC's Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 C.F.R. Part 1, Appendix B. Although other agencies sometimes reference programmatic agreements in their regulations, it is generally in the context of clarifying that if a program alternative exists, its provisions should govern Section 106 review. See, e.g., 15 C.F.R. § 922.195 (providing that a State Archeologist should certify that activity authorized under a state permit will be conducted "consistent with the Programmatic Agreement").

[55] *See* 5 U.S.C. §§ 553(b)-(c) (describing the notice and comment process for informal rulemakings by administrative agencies).

[56] 36 C.F.R. §§ 800.14(a)(1), (e)(1)-(2).

agency "may adopt [the process outlined in the program alternative] as final alternate procedures."[57] When adopted by the ACHP, these alternate procedures substitute for the ACHP's regulations for the purposes of compliance with Section 106, and are immediately effective.[58] Thus, regardless of whether the FCC seeks to initiate an unnecessary rulemaking proceeding, the effect of adoption of a program alternative by the ACHP is to immediately alter the process by which an agency may comply with the requirements of Section 106 review.

Finally, on issues concerning the construction and operation of communications towers on the railroad rights of way, the Commission is required to harmonize the requirements of the NHPA with those imposed by the Interstate Commerce Commission Termination Act ("ICCTA")[59] and the Federal Railroad Safety Act ("FRSA").[60] The ICCTA vests the STB with exclusive federal jurisdiction over rail transportation, including the construction and operation of rail facilities.[61] The statute defines rail "transportation" broadly to include ground, property, and facilities necessary for transportation, and the remedies provided under the ICCTA with respect to rail transportation "are exclusive and preempt the remedies provided under Federal or State law."[62] Communications towers used for railroad purposes are "facilities" within the meaning of the ICCTA, and thus fall under the exclusive authority of the STB.[63]

---

[57] 36 C.F.R. § 800.14(a)(2).

[58] 36 C.F.R. § 800.14(a)(4).

[59] *See* 49 U.S.C. § 701 et seq.

[60] *See* 49 U.S.C. § 20103.

[61] *See* 49 U.S.C. § 10501(b).

[62] *Id.*

[63] *See Cities of Auburn and Kent, WA—Stampede Pass Line*, 2 S.T.B. 330, 342 & n.21 (1997) ("*Cities of Auburn and Kent, WA—Stampede Pass Line*"), *aff'd*, *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 119 S. Ct. 2367 (1999); *see also City of Lincoln—Petition for Declaratory Order*, STB Finance Docket No. 34425, 2004 WL 1802302 (STB served Aug. 11, 2004), *aff'd*, *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005); *Soo Line Railroad Co. v. City of St. Paul*, 827 F. Supp. 2d 1017 (D. Minn. 2010).

Notwithstanding the breadth of its jurisdictional clause, the ICCTA leaves room for complementary federal regulation in certain circumstances, and courts have found that "[i]f an apparent conflict exists between ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible."[64] The ICCTA was enacted to "keep[] bureaucracy and regulatory costs at the lowest possible level" and avoid unreasonable burdens on rail operations.[65] The STB has explained that other federal laws should not be applied in such a way as to "unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce."[66] Similarly, the FCC should not interpret its Section 106 obligations in a way that frustrates Congressional intent in mandating PTC be installed or otherwise impede the FRA's safety mission. Just as the STB exercises jurisdiction over rail transportation, the FRA exercises jurisdiction over "every area of railroad safety," which led Congress to expressly delegate the timely implementation of PTC to that agency.[67]

The FCC's Section 106 review process has already injected uncertainty, indefinite delays, and high costs—exactly the same types of burdens that led to the STB's findings that state regulation of communications towers is preempted.[68] To ensure that the FCC's Section 106 process does not unreasonably burden interstate commerce and conflict with the jurisdiction over the construction of facilities on the railroad rights of way granted by the ICCTA to the STB, or impair rail safety in conflict with the FRA's exclusive jurisdiction over rail safety issues, the

---

[64] *Ass'n of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010).

[65] *See* H.R. Rep. No. 104-311, at 93 (1995), 1995 U.S.C.C.A.N. 793, 805.

[66] *Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayr, MA*, STB Finance Docket No. 33971 at 9 (served May 1, 2001).

[67] 49 U.S.C. § 20103(a); 49 U.S.C. § 20157(a)(1) (requiring the Secretary of Transportation to ensure that each covered railroad implements a PTC system by December 31, 2015); *see also* 49 C.F.R. Part 236, Subpart I—Positive Train Control Systems.

[68] *See Cities of Auburn and Kent, WA—Stampede Pass Line*, 2 S.T.B. at 342 & n.21.

Commission should exempt PTC wayside poles that are at least 500 feet from historic properties from review, as well as those poles that are in an area previously determined to have limited or no potential to affect historic properties. Incorporating this proposal in the Program Comment would strike an appropriate balance between satisfying the requirements of the NHPA while harmonizing other federal laws.

IV. THE PROGRAM COMMENT SHOULD BROADLY EXPEDITE AND PERMIT BATCHED REVIEW OF ANY PTC WAYSIDE POLES NOT EXEMPTED FROM SECTION 106 REVIEW

Although the AAR supports the batching of applications for historic review, merely batching large numbers of applications will not address the basic goal behind the Program Comment, which is to allow the railroads to comply with the Congressional mandate for the deployment of the national PTC network. Specifically, the railroads are concerned that while batching may expedite the entering of applications for review into TCNS, it will do nothing to expedite the review of the actual applications. As an example, when one railroad entered an initial group of PTC tower applications into TCNS in the spring of 2013, each individual application resulted in responses from at least eight Tribes, with some sites generating responses indicating interest from as many as twenty-five Tribes.[69] Even if these applications had been batched, the volume of response to each request would render the fulfillment of the PTC mandate impossible. The purpose of a program comment is to allow the ACHP to comment on a category of undertakings "in lieu of conducting individual reviews."[70] Thus, the ACHP's regulations provide that a program comment is intended to be a substitute for individual, site-by-site review. Limiting the scope of the current Program Comment process to only the batching of applications for Section 106 review would defeat the purpose of this program alternative, which is to engage

[69] *See* Kalick Letter at 6.

[70] 36 C.F.R. § 800.14(e).

in a consultative process regarding an entire category of undertakings, negotiate an exemption for those undertakings that are unlikely to have a negative effect on any historic properties, and arrive at blanket avoidance and mitigation measures that will allow for the deployment of the limited number of undertakings that remain.

If the Program Comment specifies circumstances under which a limited number of PTC wayside poles are not exempt from Section 106 review, the Bureau should define a narrow Area of Potential Effects ("APE") that is consistent with the foreseeable and minimal anticipated impact of PTC wayside poles. For those few poles subject to this strictly defined APE, the Program Comment should establish a comprehensive process by which applications may be batched and reviewed according to rail corridor, rather than on a site-by-site basis, and prioritized according to each railroads' deployment needs. In addition, instead of requiring tower construction applications to be reviewed by county, the Program Comment should provide that the railroads may submit applications for PTC wayside poles grouped as a single application for each rail subdivision, and ask SHPOs and THPOs to maintain this configuration for their review. These easily implemented steps will increase the efficiency of the Section 106 review process, and accelerate the speed of review of PTC and similar wayside poles for all parties.

A. The APE for non-exempt PTC wayside poles should be defined narrowly.

As the geographic area within which an undertaking is reviewed for direct or indirect effects on the character or use of an historic property, the APE establishes the limits of the impacted land to be considered by the SHPO or THPO reviewing each application.[71] Given the limited purpose and scope of PTC deployment and the minimal anticipated environmental impact of PTC and related wayside poles, the Program Comment should narrowly define the APE.

[71] *See* NPA at Section II.A.3.

As provided in the NPA, the default APE for visual effects for poles that are less than 200 feet in height is a radius of half a mile from the base of the tower.[72] However, this definition in the NPA may be amended by mutual agreement of the applicant and SHPO/THPO, or it may be established independently and tailored to PTC wayside poles in the Program Comment.[73] The AAR believes that the appropriate APE for visual effects from non-exempt PTC wayside towers is a radius of one-sixth of a mile. The height of the PTC wayside poles is approximately one-third the height of the poles contemplated in the NPA's APE formulation, and this significant reduction in size supports a corresponding reduction in the radius of the visual APE.[74] As PTC wayside poles of seventy-five feet and under in height are approximately the size of standard utility poles, they pose little threat of visual impact on historic properties. Moreover, the location of the poles immediately on the railroad rights of way means that in most cases the poles will be in close proximity to and complemented by other existing vertical features, including the signals they will be monitoring and related signaling equipment, further reducing the danger of any visual effect. Further, any minimal effect in this regard must take into account the necessity to locate the poles close to monitored signals to enable this important public safety initiative to proceed.

Because of the unique characteristics of the PTC program, rather than providing for an individual APE for each pole, the Program Comment should establish a linear APE along the

[72] *See id.* at Section VI.C.4.

[73] *See id.* at Section VI.C.5.

[74] The ACHP has approved program alternatives along transportation corridors with significantly smaller APEs. *See, e.g.*, First Amended Programmatic Agreement among the Federal Highway Administration, the Texas Department of Transportation, the Texas State Historic Preservation Officer [and] the ACHP Regarding the Implementation of Transportation Undertakings, 10 (2005), *available at* http://ftp.dot.state.tx.us/pub/txdot-info/library/pubs/bus/env/programmatic.pdf (establishing an APE of 150 feet for proposed rights of way projects constructed in existing transportation corridors) (last accessed Nov. 10, 2013).

railroad corridor for all covered rights of way. Given the large number of PTC wayside poles that must be approved in a short period of time, and substantial number of additional structurally similar poles that must be deployed in the near future, a site-by-site assessment of each non-exempt pole will be impossible for all involved, including the SHPOs and THPOs. The rail corridors where these poles will be deployed are innately linear, and feature generally uniform and consistent ground disturbance and previous industrial development. Moreover, the precise location of a pole will often not be knowable until railroad crews arrive at the proposed deployment site on the rail corridor. Requiring an individual APE for each pole would give rise to a cumbersome and unnecessary re-approval process each time a pole had to be re-sited for engineering reasons.

In the Public Notice, the Bureau asks if it is necessary to assess the effects of an undertaking where the only historic property within the APE is the track itself and there are no special features within the APE.[75] The AAR feels strongly that to undertake such an assessment would not be in keeping with the requirements of the NHPA, and would waste the resources of the railroad applicants, the FCC, the ACHP, and the SHPOs/THPOs. As discussed above, PTC wayside poles and other structurally similar towers that are more than 500 feet from any property listed in or eligible for inclusion in the National Register should be broadly exempt from Section 106, and the railroads should not be required to submit applications for Section 106 review for such poles.[76]

[75] *See Public Notice*, Scoping Document at 5.

[76] In similar contexts, the ACHP has found it appropriate to exempt other "small scale" undertakings along transportation corridors from Section 106 review, because of their minimal impact on the industrial right of way. *See* Programmatic Agreement among the Federal Highway Administration, Kentucky Transportation Cabinet, Kentucky SHPO, and the ACHP Regarding Implementing Section 106 of the NHPA for Federally Funded Road Projects in the Commonwealth of Kentucky (2011), *available at* http://1.usa.gov/1beL9HM at 4, 8 (exempting among other undertakings "utility installations along or across a transportation facility") (last accessed Nov. 10, 2013).

The NPA charges the Commission with resolving any disagreements between consulting parties and the railroad applicants regarding the APE for a specific undertaking within a reasonable time.[77] To expedite the review process, the AAR recommends that the Program Comment include a commitment by the FCC to resolve any such consultative issues within ten business days of submission by the railroad and/or the SHPO/THPO.

B. The Program Comment should provide for the batched, prioritized review of non-exempt PTC wayside poles and expedite the approval process.

The Program Comment should establish a process that will allow the batched submission and Section 106 review of non-exempt PTC wayside poles and expedite final pole approval. The current site-by-site review process provided in the NPA and the Commission's rules is too cumbersome and time-consuming for PTC wayside pole deployment, given the short time remaining to attempt to meet the Congressionally mandated deadline. A site-by-site approval process could also hold up deployment for an entire section of track if the railroads were forced to make minor shifts in pole installation for geological or engineering reasons. Moreover, site-by-site review does not reflect the way that PTC or structurally similar poles will be deployed by the railroads. Requiring such granular review would provide no advantages and would require additional and unnecessary effort by the railroad applicants, the SHPOs/THPOs, the ACHP, and the FCC.

Specifically, the Program Comment should recognize that the scope of review for each batch of non-exempt PTC wayside poles should be defined by the railroad subdivision.[78] Batching applications by county, as suggested in the Scoping Document, would be inefficient, as in many instances a county will only be slated to receive a few poles, and such limited

[77] *See* NPA at Section VI.C.6.

[78] See *supra* n.6.

submissions would do little to streamline the review process and accomplish the goal of accelerating approval of PTC infrastructure to ensure its timely deployment. The larger railroad subdivision provides a natural and appropriate scale for batching applications for review.

To expedite and streamline the application submission process for towers required to undergo Section 106 review, the Program Comment should:

(i) *Establish uniform contents for the submission package*. The Bureau should clearly define in the Program Comment or in an appended best practices document a unified format for all maps, technical appendices and documentation requirements. The railroads should be permitted to submit a single map, in a shapefile, Google Earth, or other common format, for each rail subdivision that denotes all non-exempt PTC wayside pole installations along all rail corridors in that area. As part of preparing the Program Comment, the Bureau should specify that SHPOs and THPOs should make their preferences for mapping format known to the FCC, which in turn should aggregate this information by rail corridor and rail subdivision and provide it to the railroads as they prepare their applications for Section 106 review. Ideally the Program Comment should establish a unified, comprehensive data format and documentation requirements for all non-exempt PTC wayside pole approval submissions, rather than having to undergo the considerable time and expense of creating separate, custom maps and responding to different documentation demands for each SHPO/THPO interested in consultation. The AAR proposes that the railroads provide the latitude and longitude coordinates for all planned PTC wayside poles to the FCC, which could then "match" those coordinates with locations where Tribal authorities or THPOs have expressed an interest in historic consultation and communicate this information directly to the railroads. The railroads could then send PTC information

packages (including route maps and installation videos) directly to the identified Tribal authorities or THPOs for direct consultation.

(ii) *Complete the review process within thirty days*. Given the uniformity of PTC infrastructure deployment across the country, review and approval of most non-exempt PTC wayside poles should be accomplished quickly. The NPA provides that review and approval of communications towers should be completed in thirty days, and the AAR believes that this timeline is sufficient under the limited circumstances where review is appropriate.[79] As discussed below, it is critical that the Program Comment also establish a review process that insures that approval of batched applications is not delayed if concerns regarding a specific pole or series of poles are raised.

(iii) *Develop a procedure to separate and address controversial installations.* The Program Comment should establish a process by which any non-exempt PTC wayside pole installation challenged by a SHPO/THPO should be separated from its batch and the remainder of the batched poles in the submission should be processed and approved to allow construction to go forward. Where a SHPO or THPO disagrees with an applicant's assessment that no historic properties will be affected by the undertaking, or believes that pole-specific mitigation measures might be necessary, the Program Comment should establish clear deadlines for the resolution of the consultation, and provide that the failure to satisfy these deadlines will result in the forfeiture of the ability of the SHPO/THPO to assert that the undertaking affects a historic property. If a SHPO/THPO identifies any concerns regarding a specific pole or series of poles, the SHPO/THPO should notify the FCC and applicant within ten business days. Given the tight construction schedules required under the current statutorily mandated deadline, this timeline

[79] *See* NPA at Section VII.A.2.

will allow the railroad to respond quickly to any objections and propose mitigation measures. If the parties fail to reach a resolution within ten business days after the railroad has been notified of concerns, the FCC should make a final determination of the nature of any further consultation necessary for the pole installation to go forward.[80]

V. THE PROGRAM COMMENT SHOULD PROVIDE GUIDANCE FOR LIMITED CONSULTATION FEES, AVOID MONITORING, AND EXPEDITE IDENTIFICATION OF MITIGATION SITES

The purpose of the Program Comment is to ensure the rapid, streamlined deployment of PTC and similar wayside poles while respecting the requirements of the NHPA and the ACHP's regulations. To this end, the Program Comment should clarify the limited applicability of consultation fees and documentation requests, avoid monitoring, establish standard mitigation options, and consider other mechanisms to increase the ability of SHPOs and THPOs to access information regarding PTC deployment.

Specifically, the Program Comment should:

(i) *Clarify fee schedules*. Given the public safety nature of this undertaking, the AAR does not believe that consultation fees for the review of non-exempt PTC wayside pole installations are appropriate.[81] This position is supported by the ACHP's own guidance. In response to growing concern about the practice of charging fees for participation in the Section 106 review process, the ACHP drafted guidelines on when payment is appropriate. The ACHP's position is quite clear: while its regulations "encourage the active participation of Indian tribes,

[80] The NPA provides that when applicants and SHPOs/THPOs are unable to resolve a dispute regarding a determination of no historic properties affected, or no adverse effect, the applicant may at any time submit the matter, together with all relevant documents, to the Commission, which will resolve the matter. *See* NPA at Sections VII.B.4, VII.C.4. The AAR supports maintaining this dispute resolution procedure going forward for the installation of PTC and related wayside poles.

[81] In addition to being significantly smaller than the much larger communications towers that SHPOs and THPOs are often asked to review, the primary purpose of installing the PTC wayside poles is to satisfy a public safety mandate, rather than develop land on the railroad rights of way for commercial profit.

they do not obligate Federal agencies or applicants to pay for consultation."[82] Even when the ACHP's regulations require a Federal agency or applicant to seek the views of a Tribal Nation, "the agency or applicant is not required to pay the tribe for providing its views," and if a request for consultation is met with a demand for payment, "the agency or applicant may refuse and move forward" to the next step in the Section 106 process.[83] Given the large number of poles to be reviewed, the imposition of fees could endanger the entire PTC deployment process. One railroad reports that in response to filing fewer than 300 PTC tower review applications in TCNS, it received requests from Tribal contacts for a total of $338,000, or an average of $1,203 per site—before any of the Tribal authorities had even made a determination of whether they had an actual interest in being consulted regarding the site.[84]

The ACHP notes that there are limited circumstances in which paying a fee for Tribal consultation might be appropriate, as, for example, when an agency or applicant asks for "specific information and documentation regarding the location, nature, and condition of individual sites, or actually request[s] that a survey be conducted by the tribe."[85] As a best practice, for those limited cases where the THPO is acting as a paid consultant, the FCC should strongly recommend that the Tribal authority adopt a comprehensive, transparent and aggregated fee schedule.[86] Any fee schedule should anticipate the batched nature of the applications for

[82] ACHP, "Fees in the Section 106 Review Process," *available at* http://www.achp.gov/regs-fees.html (last accessed Nov. 1, 2013) ("Fees in the Section 106 Review Process").

[83] *Id.*

[84] Kalick Letter at 6.

[85] ACHP, "Fees in the Section 106 Review Process," supra at n.82; *see also* "Voluntary Best Practices," *supra* at n.26 at 14.

[86] One possible template for a fee schedule could be the USET Model Explanation Cost Recovery Schedule, which was adopted by a consortium of Tribal authorities in 2004 to provide a guideline for THPOs and applicants for various consultation-related activities. *See* USET, Model Explanation Cost Recovery Schedule, *available at* http://www.usetinc.org/media/2005009._633824699407685000.pdf (last

review, as site-by-site consultative fees would irreparably thwart the rapid deployment of PTC wayside poles. The schedule should be provided to the railroads prior to the initiation of consultation. Such an approach offers obvious benefits to the railroads through establishing clear and predictable costs for Section 106 review. A fee schedule would also provide transparency and uniformity to Tribal authorities, allowing each Tribe to be certain that its consultative requests are consistent with those made by other THPOs.

(ii) *Avoid any monitoring*. The AAR believes that monitoring of any non-exempt PTC or similar wayside poles would give rise to unnecessary safety risks, and not be a good use of SHPO/THPO, FCC, or railroad resources. Track-side monitoring is inherently very dangerous, as work crews will be operating heavy equipment on or near active railroad tracks. As a result of the inherent safety risks involved in industrial installations and along rail corridors, any monitoring must be conditioned on strict compliance with general railroad safety and third-party entry requirements and the individual railroads' own safety practices. Moreover, given the minimal intrusion involved in placing these poles, an observer is unlikely to find that there is any quantity of disturbed ground to examine for previously-buried cultural artifacts. If any SHPO/THPO strongly believes that monitoring for a specific site is required, the Program Comment should require that individual to identify and provide reasonable justification for that site in writing to the FCC and applicant prior to the resolution of the consultative process, and to produce substantial evidence that construction is likely to unearth previously undetected historic or cultural properties, or intact archeological resources.[87] Should the FCC find that a SHPO or THPO has produced substantial evidence of the presence of a buried cultural resource that

---

accessed Oct. 16, 2013). However, any fee schedule should include prorated amounts taking into account the enormous scale of the PTC undertaking.

[87] *See* NPA at Section VI.D.2.d.

justifies the presence of a monitor, the FCC should request a construction schedule from the affected railroad, and monitoring must take place according to that established schedule.

(iii) *Expedite identification of specific mitigation sites*. Only a minimal number of PTC and similar wayside poles have the potential to have adverse effects on historic properties and Tribal sites of religious or cultural significance, and the AAR agrees with the FCC that there will be little potential for avoidance or minimization of these effects due to the limited flexibility that the railroads have in positioning the poles pursuant to the PTC public safety mandate.[88] To avoid having to make last minute assessments of any pole siting, as a best practice SHPOs and THPOs should be strongly encouraged to pre-designate any section of track where they anticipate siting concerns and provide that list to the FCC and the railroads. The remainder of the subdivisions should be identified as cleared for all seventy-five foot pole construction, regardless of the type of radio device or antenna, and on a permanent basis. For any remaining areas the FCC should provide avoidance concerns to the railroads by rail corridor and rail subdivision, if more than one pole is affected, and the FCC should ensure that avoidance and mitigation measures are presented to, and approved by, all relevant SHPOs and THPOs simultaneously.

As a mitigation measure, the Program Comment could include a reiteration of the pledge by the railroads to cease work and notify stakeholders immediately if any artifacts or other items of historic interest are discovered during the course of any covered construction, and to take reasonable and immediate steps to protect the site from environmental destruction, vandalism, and/or theft, and to protect the confidentiality of the site. In the unlikely event that any such artifacts are found, or if any SHPO or THPO feels the need for a possible shift in pole location,

[88] *See Public Notice*, Scoping Document at 6.

that SHPO or THPO should provide notice to the FCC and applicant within ten business days of that determination. The railroads will designate and make available to the FCC a team of engineers who can respond quickly to assess siting concerns raised by any SHPO or THPO to determine if avoidance is possible for specific non-exempt PTC wayside pole locations.

(iv) *Improve SHPO/THPO access to PTC installation information*. The FCC should consider taking steps to facilitate SHPO and THPO access to information regarding PTC and related pole deployment in order to streamline the consultative process. The railroads could provide the FCC with a list of rail corridors to share with the SHPOs and THPOs to help streamline their consultation. To encourage public comment, the FCC could additionally establish a website that would provide images and videos illustrating the various designs of PTC wayside poles and their installation process. The FCC should also solicit and adopt similar suggestions from the SHPOs and THPOs, as appropriate, to ensure that any concerns about PTC wayside pole deployment are addressed as early as possible in the consultative process.

VI. CONCLUSION

The NHPA and the ACHP's rules do not require that federal undertakings avoid all impacts on historic properties, but only that federal agencies "take into account" the effect of their undertakings on such properties.[89] Exempting PTC wayside poles from Section 106 review is both appropriate and in the public interest. The AAR urges the Bureau to expedite its drafting of the Program Comment, which is a critical step that could help the railroads in their efforts to meet the aggressive PTC deployment deadline established by Congressional mandate. The Program Comment should broadly define exemptions consistent with 36 C.F.R. Sections 800.14(c) and (e), base its scope of review for those non-exempt PTC wayside poles subject to

[89] *See NPA R&O*, 20 FCC Rcd at 1081-82 ¶ 21, citing 16 U.S.C. § 470f.

Section 106 review by rail corridor, provide for prioritized batching of applications by subdivision, establish documentation requirements and procedures for the resolution of the consultative process, limit consultation fees and monitoring, and implement as best practices standard avoidance and mitigation measures.

Respectfully submitted,

By: */s/ Michele C. Farquhar*

Louis P. Warchot
Senior Vice President-Law
and General Counsel
Timothy J. Strafford
Assistant General Counsel

The Association of American Railroads
425 3rd Street, S.W. Suite 1000
Washington, DC 20024
(202) 639-2502

Michele C. Farquhar
Deborah K. Broderson
Hogan Lovells US LLP

Counsel to the Association of American Railroads
555 13th Street, NW
Washington, DC 2004
(202) 637-5663

November 15, 2013

APPENDIX A

Fig. 1: Typical configuration of tilt/fold-over PTC wayside pole on railroad right of way.

Fig. 2: Typical configuration of fixed PTC wayside pole on railroad right of way.

APPENDIX B

Letter from Theodore K. Kalick, Senior U.S. Regulatory Counsel, Canadian National Railway, to Stephen G. DelSordo, Federal Preservation Officer, Federal Communications Commission, "Evaluation of Railroad Wayside Facilities" (May 9, 2013)

Law

Theodore K. Kalick
Senior U.S. Regulatory Counsel

601 Pennsylvania Avenue, NW
Suite 500 North Building
Washington, D.C. 20004

T 202-347-7840
F 202-347-8237

www.cn.ca

May 9, 2013

Stephen G. DelSordo
Federal Preservation Officer
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Evaluation of Railroad Wayside Facilities

Dear Mr. DelSordo:

Thank you again for speaking with us on April 17 to clarify the historic and cultural consultation requirements applicable to railroads. As requested, this letter provides a description of Canadian National's wayside detectors. In addition, since we last spoke these requirements have stalled and threaten our timely implementation of the Congressionally mandated Positive Train Control (PTC) safety initiative, in particular with respect to the wayside monopoles associated with PTC, and we would like to address those here as well. It is CN's view that these wayside facilities do not have any significant effect on historic and cultural properties, and we appreciate your offer to consult with the relevant State Historical Preservation Officers (SHPOs) and Tribal Historical Preservation Officers (THPOs) to review and confirm that view.

Specifically, we respectfully submit that the installation of these small wayside facilities on previously disturbed ground on the ballasted roadbed or within the railroad right-of-way (ROW), on structures that are typically less than 20 feet for detectors and not more than 60 feet for PTC monopoles, qualifies for exclusion from the Section 106 process consistent with the policies underlying the Nationwide Programmatic Agreement (NPA). In addition, CN considers that there is no significant environmental impact from wayside facilities.

The company respectfully requests expedited consideration of this matter. The routine deployment of wayside detectors to monitor and respond to operational issues and ensure safe railroad operations is a frequent and often imperative requirement. More urgently, and as you learned in more detail from the industry-wide information recently provided to you, with

respect to PTC the seven Class 1 railways, including CN, plan to build collectively over 21,000 PTC antenna structures across the Nation before the statutory Congressional deadline of December 31, 2015 for PTC implementation. *See* 49 U.S.C. § 20157; 49 C.F.R. § 236.1001 et seq. PTC is a highly complex and untried collision avoidance system requiring: (i) the development of new communications equipment and software, (ii) acceptability and functionality testing through pilot programs, (iii) interoperability testing amongst all of the railways' PTC systems and (iii) Federal Railroad Administration certification. Like the other railroads, the company is subject to an aggressive implementation schedule and a narrow window for construction due to weather considerations and the need to reserve free track-time without interfering with the activity of an operating railroad. Delays could result in the postponement of a significant portion of CN's scheduled 2013 construction until 2014, uncertainty surrounding the greater number of towers to be installed in 2014 and 2015 and, ultimately, the failure to meet the statutory Congressional deadline.

A. Company Background

Canadian National Railway Company and its U.S. rail operating subsidiaries (collectively, "CN") operate approximately 20,600 route-miles of track in North America, including in 15 U.S. states: Alabama, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New York, Ohio, Pennsylvania, Tennessee and Wisconsin. Maps of its routes are attached under Tab A. Additional information about the company is available at http://www.cn.ca/en/about-cn.htm.

B. Description of Wayside Facilities

The types of wayside facilities deployed by CN and covered by this letter include PTC facilities and three types of wayside detectors: (i) defect detectors, (ii) Dual Tone Multi-Frequency (DTMF) controlled track switching devices, and (iii) automatic equipment identification (AEI) readers.

Positive Train Control Facilities. CN's implementation of PTC will involve the installation of short monopoles with a limited footprint on previously disturbed ground on the railroad's ROW. CN will deploy approximately 1500 monopoles, one approximately every two miles, along the ROW. These monopoles will be tilt (or fold-over) style structures placed at a height not greater than 60 feet above ground level (AGL) with a side-mounted antenna that adds not more than 5 feet to the height of the monopoles. The footings for these monopoles will not extend more than 10-15 feet below the surface of the ballast depending on soil conditions. The PTC equipment is mounted inside a metal box that is attached to the monopole; thus, no additional excavation or ground footprint is required for the equipment. A typical CN installation is illustrated by the photographs and drawings attached under Tab B.

The monopoles will be installed with a boom truck with a mounted auger to create a 12 inch diameter hole into which the footings will be set and to hoist the monopoles into place. Access and egress to each site will be via hi-rail vehicles on the track and, while a pre-existing road may

be used, no roads will be built to facilitate construction. Because construction access principally will be by rail, the work must be scheduled when there is free track time and ideally during the spring and summer when the weather is accommodating and train schedules are lighter in advance of the fall grain harvest season.

Siting of PTC monopoles is driven solely by their function, as they must be located in close proximity to the railroad tracks and immediately adjacent to the particular track signal or switch which they control or monitor. There are not feasible alternative locations for siting without involving more invasive excavation or additional towers.

Defect Detectors. These detectors are small devices that are placed on previously disturbed ground directly on the railroad ballast (*e.g.*, the coarse gravel or crushed rock laid to form a bed for the railroad tracks) or within the ROW and their installation involves minimal, if any, excavation. Defect detectors collect and transmit to the train crew critical safety-related information on system status in real time which is used by the crew to take a variety of actions such as stopping the train or engaging quickly in maintenance, repairs and equipment replacement to prevent serious incidents, including derailments, that affect railroad property, personnel and the general public. These devices include equipment such as: (i) hot box detectors that monitor super-heated wheels and wheel load bearings to warn of equipment failure; (ii) high-wide load detectors that measure against maximum height and width requirements to avoid hitting overpasses and other obstacles; and (iii) wheel impact load detectors (WILD) that evaluate impact forces caused by damaged wheels, and (iv) brittle bar/debris detectors that monitor whether any equipment or material is dragging under the rail cars that could derail the train.

When a problem is detected, the train crew is immediately and automatically alerted so that appropriate action may be taken. Except with respect to WILD devices, these alerts are sent using radio communications facilities that must be located near or collocated with the detectors and generally operate on frequencies already authorized to the company in spectrum allocated for railroad use (*e.g.*, on 160 MHz channels). Typically, an antenna is mounted on a short pole or on a small shelter that houses a transceiver and related equipment. The radio facilities may be collocated on an existing bungalow installed near the tracks that support other licensed or railroad facilities. In most cases, the antennas for such facilities operate with less than 45 Watts transmitter power output and less than 75 Watts effective radiated power. Some typical installations of these structures are illustrated by the photographs under Tab D.

The radio facilities associated with defect detectors have a limited footprint. In particular:

- Hot Box Detector antennas are mounted on a 15 foot pole attached adjacent to the side of a 10 foot high bungalow that houses electronic equipment and that is typically 6 feet wide and 6 feet long and has 4 legs buried 3 feet below the surface. The maximum height to the tip of the antennas in 20 feet AGL;
- Brittle Bar/Debris Detector antennas are mounted on a 15 foot pole installed to support a metal box that houses the electronic equipment for the detector and the antenna.

The footing for the pole is buried less than 4 feet in the ground. The maximum height to the tip of the antennas is 20 feet AGL;

- High-Wide Load detector antennas are installed at a maximum height to tip that will not exceed 4 feet AGL. The antennas are mounted on metal boxes that house electronic components and are located near or at the base of the non-tower lattice or scaffold-like bridges that pass over the tracks at heights greater than the railcars. The bridge is mounted on concrete footings buried 3-4 feet deep in a hole 1 foot wide by 2 feet long; and
- Wheel Impact Load Detectors are square panel radio-frequency identification (RFID) antennas mounted not higher than 5 feet AGL on an 8 foot or shorter pole embedded in a concrete footing 3-4 feet deep. They are connected to equipment in a 6 foot by 6 foot bungalow with 4 legs with footings 8 feet deep, where information is transmitted via wireline facilities to the company.

Track-Switching Devices. CN deploys Dual Tone Multi-Frequency (DTMF) radio technology to control track switching at some sites. These devices utilize a low- powered trackside transceiver that must be located near the switch and operate on channels allocated for railroad use. The train conductor uses a portable or mobile device that transmits DTMF tones to send a signal to the transceiver which interfaces with electronic equipment to determine the position of the switch or the tracks, throw the switch remotely if necessary, and report back their status to the conductor.

A typical CN installation is illustrated by the photographs under Tab D. These devices are installed on existing non-tower switch machinery located in the ROW on previously disturbed ground. Specifically, the antenna is mounted one of a variety of CN-supplied metal boxes or cabinets that house the electronics to control the switching equipment as well as the DTMF low-power transmitter equipment. The height of the box or cabinet varies from 5 to 10 feet above ground and is mounted on poles with footings embedded not more than 8 feet deep. The DTMF antennas are typically shorter than 12 inches and are mounted either on or under the box or cabinet.

Automatic Equipment Identification (AEI) Readers. CN, like all Class I railroads, has implemented AEI technology in compliance with the Association of American Railroads (AAR) Interchange Rules and the AAR Manual of Standards and Recommended Practices. AEI technology involves the deployment of passive RFID tags mounted on each side of rolling stock and active trackside readers. These low-powered readers operate in the 902-928 MHz band under Subpart M in Part 90 of the FCC's Rules.

A typical CN installation, illustrated by the photographs attached under Tab E, is comprised of a bungalow that houses AEI equipment and an antenna array with two readers, one on each side of the track, for redundancy and reliability. Each AEI reader is mounted on a short structure - usually on a pole, but sometimes on a small lattice structure - which must be located in the ROW immediately adjacent to the track. When a train passes by, the reader will scan the tags placed on the side of railcars and route information from those tags to electronic equipment

housed in the bungalow where it is relayed to CN's head office through leased wireline facilities provided by a telephone company (*e.g.,* via the connection at the phone pole in the photograph to the left of the bungalow) where it is cross-checked with the company's actual train consist. The data obtained is essential to tracking the location of rolling stock, including cars that may be carrying hazardous material.

The installation of these devices is in the railroad ROW on previously disturbed ground. Specifically, the AEI readers are located in a box with the antenna side-mounted on a pole or small lattice structure not higher than 10 feet AGL. The pole or structure is embedded in concrete 3 to 6 feet deep and 1 foot in diameter below the surface of the ballast. The associated bungalows are 6 feet by 4 feet with 4 legs embedded 8 feet deep and 1 foot in diameter without cement footings.

C. Impact of Wayside Facilities on Historic Properties

CN's practices for the installation of PTC towers and wayside detectors are designed to ensure that there is no significant environmental, historical or cultural impact. CN believes these wayside facilities qualify for exclusion from Section 106 review as contemplated by the NPA at Section III.F.

All wayside facilities meet the following criteria:

(i) they are located on the ballast or sub-ballast of the railroad roadbed or the ROW,
(ii) the construction and minor excavation is limited to the railroad roadbed or ROW and all access and egress is done by hi-rail vehicle or pre-existing roads,
(iii) all work is done on previously disturbed ground, with the excavation for the wayside detectors not greater than 8 feet and for the PTC monopoles not greater than permitted under the exception for such footings set forth in Section VI.D.2.c(i) of the NPA,
(iv) there is no impact on topography post-construction,
(v) there is no removal of vegetation or trees as these have typically already been cleared from the ROW,
(vi) CN will cease construction if any such resources are found, and
(vii) the existing land use is already dedicated to railroad operations and the deployment of wayside detectors and PTC monopoles is consistent with such use and will not be changed or expanded beyond the ROW.

Furthermore, these facilities create at most a minor physical or visual impact which is entirely within the character of the railroad property and current land use (*i.e.,* they are similar to numerous, existing railroad signal lights installed on poles or overhead gantries, illumination systems, overhead wires (*e.g.,* catenaries), and utility poles). With respect to the historic impact of wayside detectors, HRA Gray & Pape LLC is separately providing to you a letter dated today containing their conclusion that such structures have no effect on historic properties. (A copy of the HRA letter, without the attachments, is included under Tab F).

With respect to the historic impact of the PTC monopoles, CN has previously consulted with SHPOs in Illinois, Kentucky, Tennessee and Louisiana regarding 240 PTC 60-foot monopole installations and all sites were cleared. This large representative sampling confirms that PTC monopoles are extremely unlikely to have any physical or visual effect on historic properties, and that the continued expenditure of SHPO and company resources on the historic review of such facilities is unnecessary and unwarranted.

In sum, the company respectfully submits that PTC monopoles and wayside detectors have no significant historic effect and thus their exclusion from Section 106 review is consistent with Sections III.F, VI.B and VI.E.2 of the NPA. *See also* Nationwide Programmatic Agreement Regarding Section 106, WT Docket No. 03-128, *Report and Order*, FCC 04-222 (rel. Oct. 5, 2004) ("NPA *Report and Order*"), ¶¶ 65-68.

D. Consultation with Indian Tribes

CN has conducted desktop reviews to determine if its railroad properties cross tribal lands. This has mainly involved reviewing publicly available maps of current tribal lands, which, it acknowledges, does not completely address ancestral, aboriginal or ceded lands. This exercise revealed, however, that none of our planned construction was in fact on tribal lands.

Though adopted as a "voluntary" system, you recently advised CN and industry counsel that CN and other rail carriers should use the Tower Construction Notification System (TCNS) to complete tribal consultation. Accordingly, CN entered just over 280 sites into TCNS, including the 240 PTC 60-foot monopole facilities noted above. Only a few of CN's TCNS entries involve traditional radio towers with heights that might have an impact on historic or cultural resources.

Unfortunately, CN quickly discovered the delays and costs associated with the registration. For example, in the month since it has entered sites into TCNS, tribal contacts have sought payment of fees totaling $338,000, or $1,203 on average per site, even before they review a TCNS filing, and even though they might not have an actual interest. There may be further fee requests over the remainder of the response period. Overall, CN has received more than 2,000 automated responses to its TCNS registrations that would appear to require further action. Every site that CN entered into TCNS has resulted in responses from at least eight tribes; some sites have resulted in responses from as many as 25 tribes.

Significantly, the TCNS processing period is apparently extended indefinitely once a tribal contact seeks a fee, expresses an interest in any form, or requests additional information. Nonetheless, many tribes indicated that their primary concern is with cell towers, and others only requested that if archeological resources are actually encountered, the tribe should be contacted. The first item is inapplicable to CN's wayside PTC and detector facilities, and CN has complied and will continue to comply with the latter condition.

The payment of fees appears inconsistent with the idea that the TCNS process is intended to help the FCC meet its own consultation obligations which, we understand, do not require the payment of fees. *See* NPA *Report and Order*, ¶ 101. It is the delays engendered by this process, however, that are of greater concern. The planning and logistics for PTC construction require significant advance preparation. Delays could cause the company to incur demobilization costs and penalties to its contractors in the order of $150,000 per week. Indeed, the company had completed environmental evaluations and was ready to commence construction later this month on more than 177 PTC monopoles, but directed construction crews to suspend their operations until the company completed the TCNS process for these structures. CN's implementation schedule, which has been submitted to the FRA, requires it to install 240 PTC monopoles this year and collectively 1,500 additional monopoles over the next two years. Of the 240 PTC monopoles to be constructed this year, 22 are on CN's Baton Rouge subdivision required for its PTC pilot program and interoperability testing scheduled for early next year.

CN respectfully submits that, on balance, completing the TCNS process in the narrow circumstances described herein is unnecessary as: (i) the construction is on previously disturbed ground on the ROW with limited if any sub-surface excavation that is unlikely to impact archeological resources, (ii) CN would preserve such resources and make appropriate notifications in the unlikely event any were encountered, and (iii) the SHPOs that have reviewed sites to date have found no historical or cultural impact. Just as importantly, CN's ability to locate wayside PTC towers anywhere other than near the signals, switches and equipment on the railroad ROW that they need to monitor is limited if not non-existent. Thus, site by site consultation with SHPOs and Indian tribes is unnecessary and an undue burden on all involved (*i.e.*, the FCC, the SHPOs, the Indian tribes and the railroads) given the extremely low probability of an adverse cultural impact. Indeed, the FCC has repeatedly stated that the review process does not require perfection in evaluating potential effects of an undertaking, but a reasonable and good faith effort to protect historic and cultural resources. *See, e.g.,* NPA *Report and Order,* at ¶¶ 21, 35.

The outlined approach, while fully protecting any theoretical site where actual archeological or cultural resources might be discovered, would preserve the company's and the industry's ability to implement PTC in accordance with Congress's deadline and would clearly be less burdensome on the resources of Indian tribes, SHPOs, the FCC and the industry as opposed to requiring that all wayside facilities be registered through TCNS. This conclusion is supported by the fact that CN has operated a railroad (through its subsidiaries) in the involved States for over 100 years and has not received any complaints or concerns from tribal groups regarding facilities construction, even though it frequently performs other, non-radio communications-related construction on the railroad ROW for a variety of reasons (*e.g.*, cabling and installation of track, signals and switches).

Accordingly, CN respectfully requests that the FCC consult with the SHPOs/THPOs regarding the structures and construction practices described herein with a view to advising expeditiously the application of the Section III.F exclusion in the Nationwide Programmatic Agreement.

E. Conclusion

Thank you again for your attention to this matter. The problems we have described in this letter befall not only CN, but also the entire railroad industry. CN submits that neither the Nationwide Programmatic Agreement, the TCNS process, nor the FCC's environmental review requirements anticipated their effect on routine railroad operations nor a nationwide, time-sensitive, federally-mandated safety initiative such as PTC. CN has worked closely with nationally recognized environmental consultants to conduct nearly 500 environmental evaluations across the system of wayside detectors and PTC monopoles which revealed no significant environmental and historic impact. If we obtain SHPO, tribal and FCC concurrence that these sites fall within the Section III.F exclusion under the NPA, we could proceed with the implementation of PTC and the installation of necessary wayside devices to avoid further delays. We therefore submit this letter for the FCC's urgent consideration and for its use during consultation with the SHPOs/THPOs.

Should you have any questions or need further information regarding this letter, please contact me at (202) 347-7840, or by email at ted.kalick@cn.ca.

Respectfully submitted,

Theodore K. Kalick

Theodore K. Kalick
Senior U.S. Regulatory Counsel, CN
FCC Compliance Officer

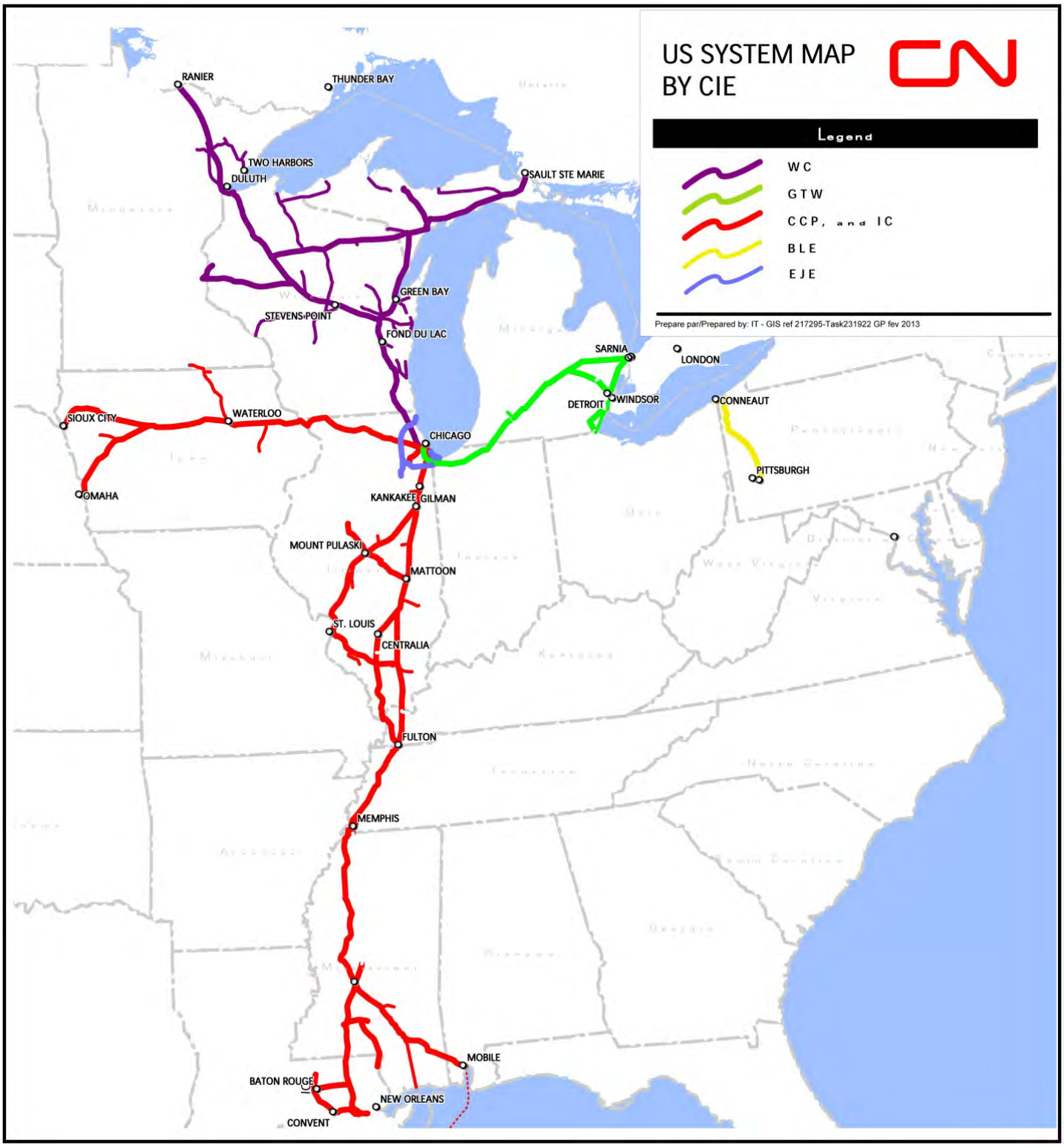
cc: Don Johnson, Dan Abeyta, Jeff Tobias, Richard Arsenault, FCC
David E. Hilliard, Wiley Rein LLP, FCC Counsel to CN

TAB A

ROUTE MAPS

CN NORTH AMERICA ROUTE MAP

CN U.S. ROUTE MAP



TAB B

PTC FACILITIES

TYPICAL CONFIGURATION OF PTC FACILITIES

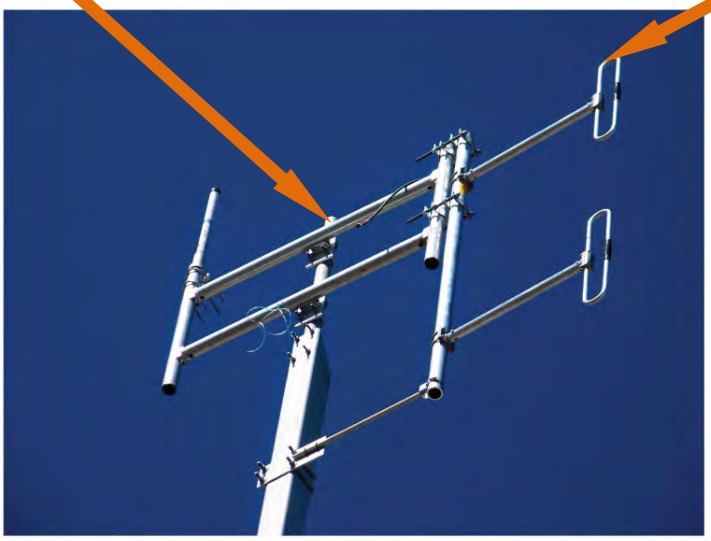
60 foot, tilt/fold-over monopole in ROW next to side of track; excavation limited to installation of footing

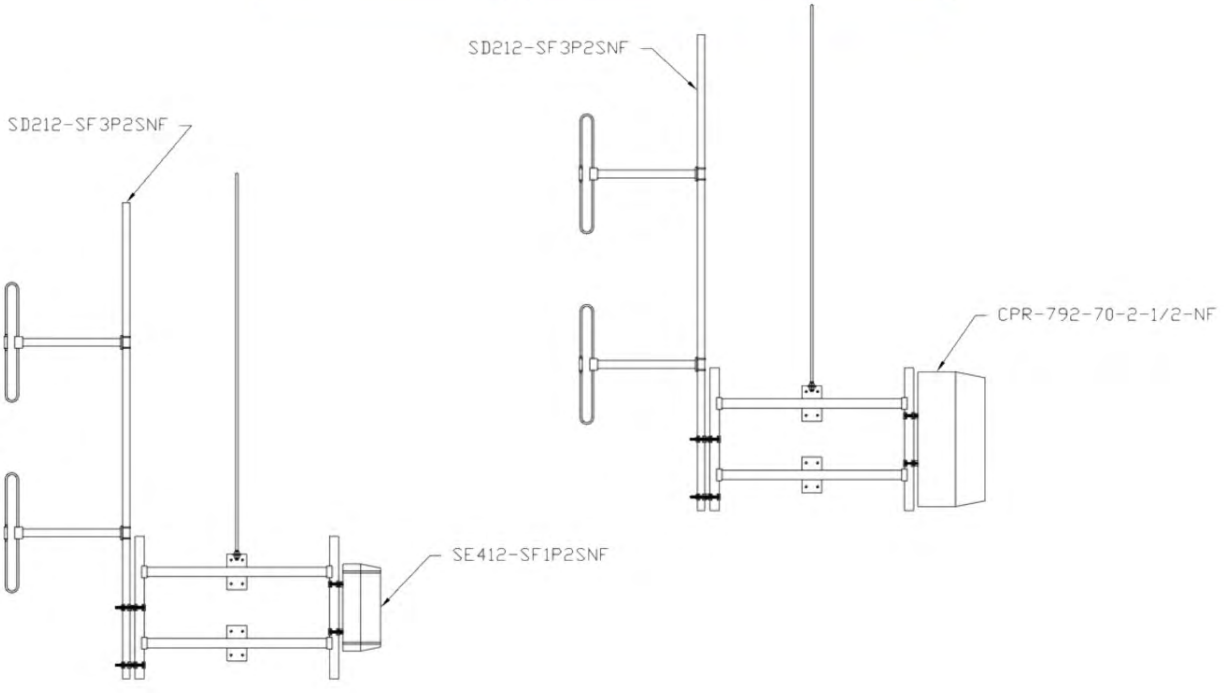
PTC antenna side-mounted at height to tip not greater than 65 feet AGL

CLOSE UP OF PTC ANTENNA AND SPECIFICATIONS

Monopole-supplied antenna bracket. The height of the base of the monopole and the bracket does not exceed 60 feet AGL

PTC antenna side-mounted on monopole's antenna bracket at height to tip that will not exceed 65 feet AGL





TYPICAL CONFIGURATION OF PTC FACILITIES

Shelter to house radio equipment and related components

8ft. x 8 ft. platform braced onto monopole without further excavation

ILLUSTRATION OF RAILWAY ROADBED AND TYPICAL PLACEMENT OF PTC MONOPOLES

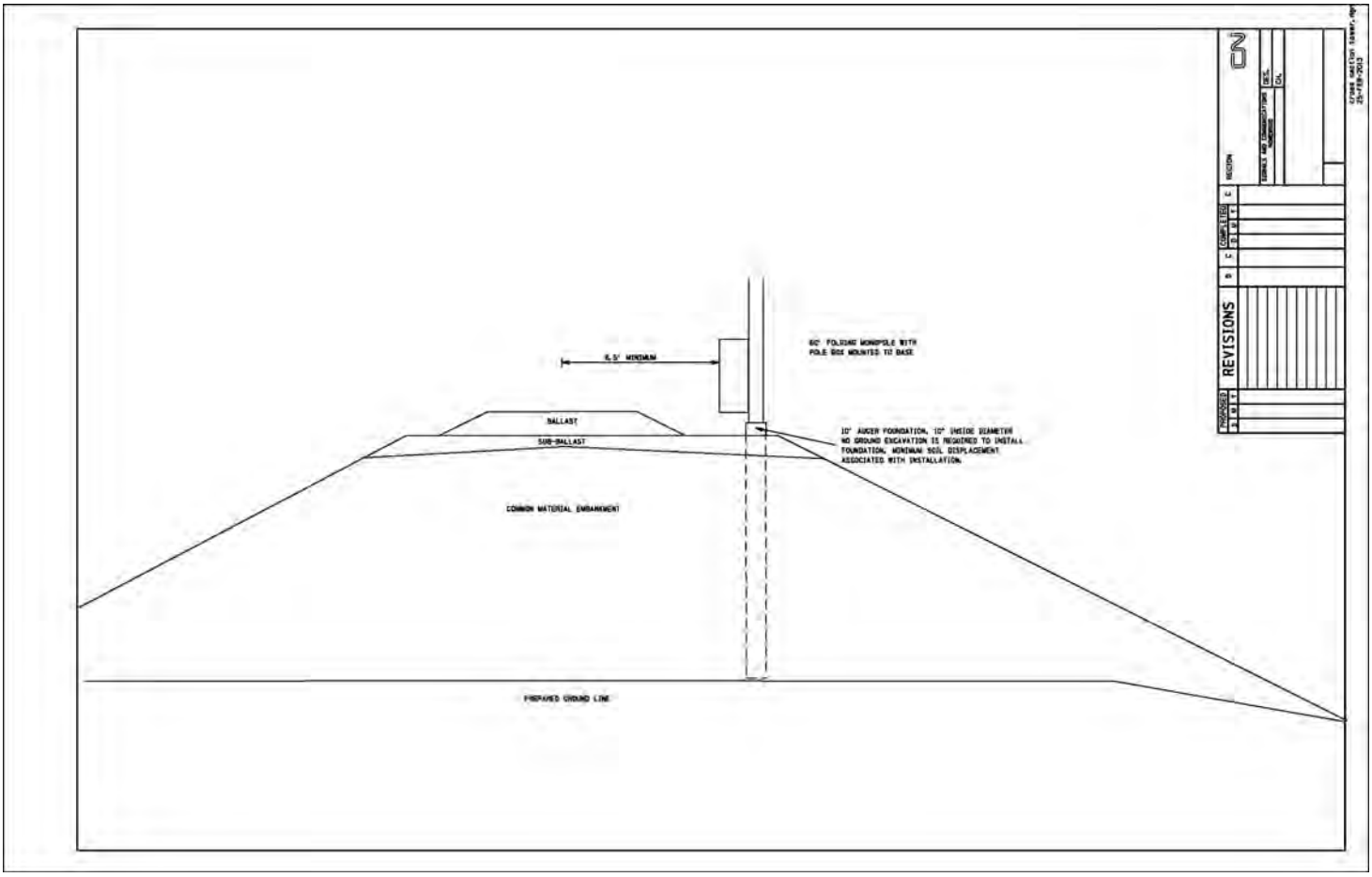
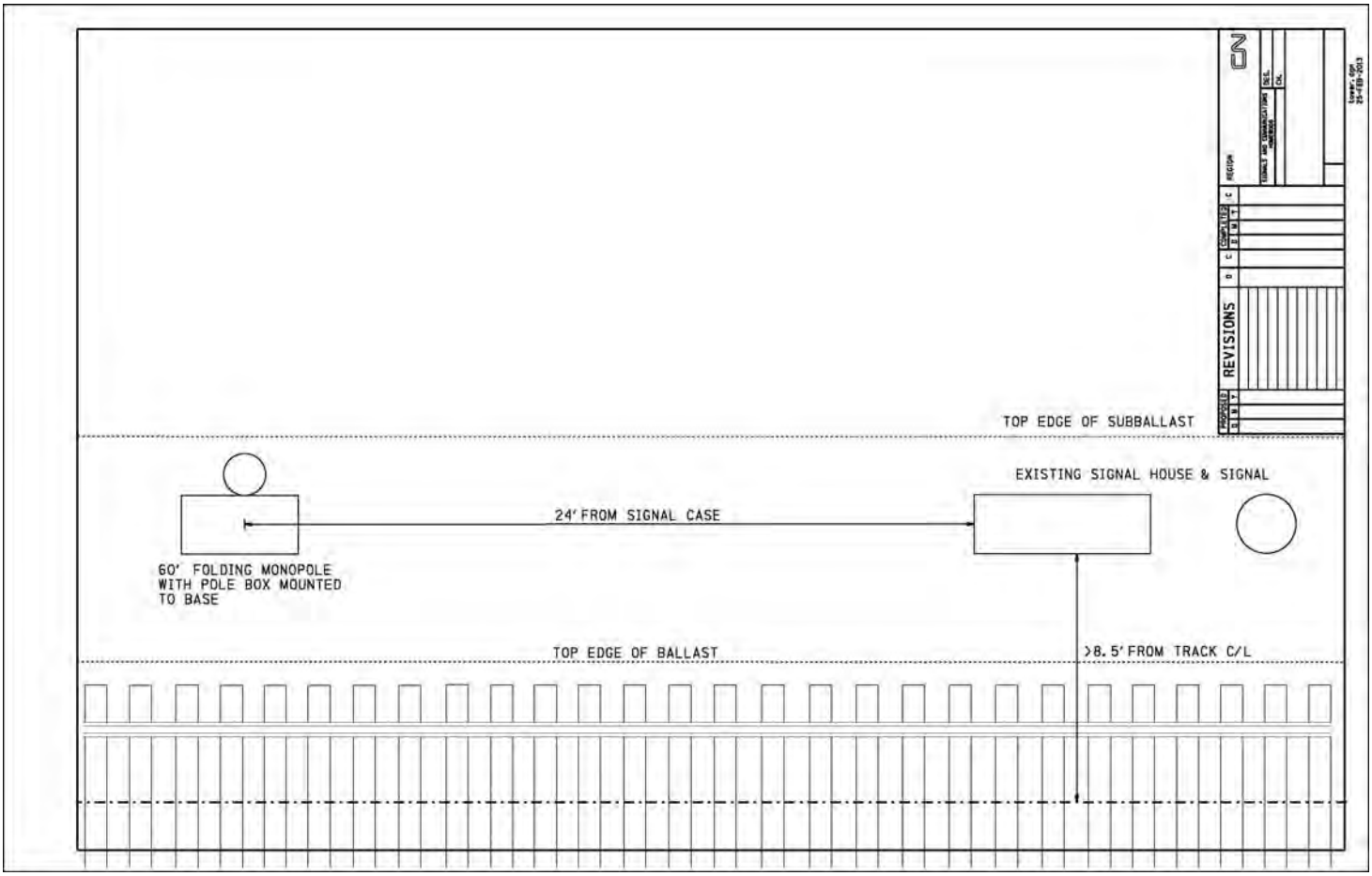


ILLUSTRATION OF RAILWAY ROADBED AND TYPICAL PLACEMENT OF PTC MONOPOLES



TAB C

DEFECT DETECTORS

TYPICAL CONFIGURATION OF CN HOT BOX INSTALLATION

Defect detectors installed in railroad right of way next to each side of track. These devices do not contain radio facilities

TYPICAL CONFIGURATION OF CN HOT BOX INSTALLATION

Shelter to house electronic equipment and related components for hot box detector. Shelter also used to house low-power transmitter and related electronics

When radio facilities are used, antenna is mounted on grounded pole attached to shelter at a height to tip not greater than 20 feet AGL

TYPICAL CONFIGURATION OF HIGH WIDE LOAD DETECTOR

Antenna mounted on non-tower enclosure that houses electronic components for detector

Cables for detector installed on existing railroad structure/bridge over track. High Wide Load detectors do not contain radio facilities

Detector connected to electronics in enclosure. Enclosure also houses radio equipment

CLOSE-UP OF ANTENNA ASSOCIATED WITH HIGH WIDE LOAD DETECTOR

TYPICAL CONFIGURATION OF BRITTLE BAR/DEBRIS DETECTOR INSTALLATION

Brittle Bar/ Debris detector installed on tracks in railroad ROW. Detector does not contain radio facilities

TYPICAL CONFIGURATION OF BRITTLE BAR / DEBRIS DETECTOR INSTALLATION

Enclosure to house electronic equipment and related components for detector. Shelter also used to house low-power transmitter

Antenna mounted on grounded non-tower structure at a typical height to tip of 10 feet, but not to exceed 15 feet AGL

TYPICAL CONFIGURATION OF WHEEL IMPACT LOAD DETECTOR INSTALLATION

Detector installed in railroad ROW next to track. These devices are connected to wireline facilities. Detector is not connected to other radio facilities.

CLOSE-UP OF TYPICAL WHEEL IMPACT LOAD DETECTOR ANTENNA

TAB D

DTMF-CONTROLLED TRACK SWITCHES

TYPICAL CONFIGURATION OF DTMF-CONTROLLED TRACK SWITCH INSTALLATION

CN employee uses DTMF-enabled portable or mobile to communicate with trackside transceiver

Enclosure for mechanical equipment used to switch tracks

CN-supplied enclosure that houses DTMF low power transmitter and related electronics to control switching equipment

CLOSE-UP OF TYPICAL DTMF-CONTROLLED TRACK SWITCH INSTALLATION

DTMF antenna (*e.g.,* Laird Antenex) mounted beneath metal enclosure)

CN-supplied enclosure that houses DTMF low power transmitter and related electronics to control switching equipment

Flashing light used for visual alerts to CN employee

TAB E

AUTOMATIC EQUIPMENT IDENTIFICATION (AEI) READERS

TYPICAL CONFIGURATION OF CN AEI READER INSTALLATION

Utility company-supplied pole for electric and wireline telephone connections

CN-supplied shelter to house AEI electronic equipment and related components

AEI transmitter/antenna mounted on short structure in ROW next to each side of track. These devices are not connected to other radio facilities

TYPICAL CONFIGURATION OF AEI READER INSTALLATION ON POLES

AEI antennas/readers mounted on short poles in railroad right-of-way next to each side of track

TAB F

HRA LETTER

(without attachments)

HRA Gray & Pape, LLC

May 9, 2013

Stephen G. DelSordo
Federal Preservation Officer Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Section 106 Consultation,

Dear Mr. DelSordo:

HRA Gray & Pape, LLC., (HRAGP) and Golder Associates, Inc., (Golder) are under contract with Canadian National Railway Company, on behalf of its U.S. rail operating subsidiaries (collectively, "CN"), to conduct cultural resources reviews pursuant to the Nationwide Programmatic Agreement For Review Of Effects On Historic Properties For Certain Undertakings Approved By The FCC.

HRAGP, on behalf of Golder and CN, is reviewing the need for a cultural resources assessment of a series of small wayside detectors proposed for construction as part of CN's regular railroad operations and efforts to ensure the safety of its rail system.

The proposed structures will be used to support a variety of railroad communications such as Automatic Equipment Identification (AEI) Readers, hot box detectors that monitor super-heated wheels and wheel load bearings; switch status detectors that determine whether the tracks are properly configured; High Wide Load detectors that measure against maximum height/width requirements; and detectors (Brittle Bars) that monitor whether any equipment is dragging under the rail cars. These structures vary in size and height, but are all relatively small, low-profile, and will be placed entirely within existing rail Right-of-Way (ROW). Subsurface excavation required during the construction or use of these structures is expected to take place within ballast areas or along otherwise disturbed areas. Access for all construction activities will be via rail. A brief description of each type of equipment has been provided by CN, and is presented below; these descriptions are accompanied by photographs to illustrate some typical examples of this structure.

Hot Box Detector

This piece of equipment is a heat sensing device installed along the railroad for measuring the temperatures of passing journal bearings. Bearing temperatures are transmitted from the wayside stations to the train crew who can stop a train if an overheated journal is detected. The Hotbox Detector hardware that is used to measure and process the temperature information is installed in a six-foot square, ten-foot high metal "bungalow" with four mounting feet buried three feet into the ground. A 15-foot antenna pole is mounted on the bungalow, with the bungalow and pole together reaching a maximum height of 20 feet. Please refer to Plates 1 and 2.

Cincinnati Ohio
1318 Main St.
Cincinnati, OH 45202
513.287.7700
f 513.287.7703

Missoula Montana
125 Bank St.
Fifth Floor
Missoula, MT 59802
406.721.1958
f 406.721.1964

Houston Texas
1428 West Alabama St.
Houston, TX 77006
713.541.0473
f 713.541.0479

Richmond Virginia
100 West Franklin St.
Suite 102
Richmond, VA 23220
804.644.0656
f 804.643.8119

Seattle Washington
1904 Third Ave.
Suite 240
Seattle, WA 98101
206.343.0226
f 206.343.0249

Portland Oregon
909 N. Beech St.
Suite B
Portland, OR 97227
503.247.1319
f 503.284.1161

Providence Rhode Island
60 Valley St.
Suite 103
Providence, RI 02909
401.273.9900
f 401.273.9944

Brittle Bar Detector

A Brittle Bar is a device installed on the rail line to detect objects dragging on the underside of a rail car. A Brittle Bar Detector monitors and transmits information from the Brittle Bar, and includes a structure with a small equipment case located at the approximate mid-point, and an antenna. The combined height of the structure and antenna is typically 15 feet, and the dimensions of the equipment case are 25 inches in width x 16.5 inches in length x 18.25 inches in height. The structure foundation is buried 3.7 feet into the ground. Please refer to Plates 3 and 4.

High Wide Load Detector

The High Wide Load detector monitors loads from the top and the sides of rail cars and measures against maximum height and width requirements to avoid hitting overpasses or other obstacles. The monitoring devices are installed on a structure bridge mounted on either side of the track. A small case is part of the High Wide Load detector hardware. The cases are typically two feet in length, four feet in width, and between four and six feet in height. A slim profile antenna is mounted on the top of the case and would not extend more than four feet above the case.

The case is mounted on a structure that includes concrete footings buried approximately four feet deep in a hole measuring approximately one foot wide by two feet in length. Please refer to Plates 5 and 6.

Automatic Equipment Identification (AEI) Reader

AEIs read tags on either side of passing rail cars to track the location and consist of the cars, including those that may be carrying hazardous materials. Most of the hardware receiving this information is sheltered in a metal four-foot by a six-foot bungalow. The bungalow has four one-foot in diameter drop-down legs buried three to six feet deep. The AEI readers, one on each side of the track, are located in a box with the antenna. The antenna is an ABS radome that protects the antenna from snow and ice and is mounted on a 10-foot pole or slim structure on the side of the track; the placement of the pole on a sloped side results in a maximum height that will not exceed seven feet. The pole/structure sections are typically imbedded in two “sono-tube” concrete foundations. Two tubes are required for each structure. The dimensions of the footings are six feet deep and one foot in diameter. Please refer to Plates 7 and 8.

Wheel Impact Detectors

Wheel Impact Detectors measures impact forces cause by damaged wheels. It associates the defective wheel with the car, and thus contains an AEI component. A Transcore SmartPass 1620 square panel antenna mounts with clamps to an aluminum pole eight feet high imbedded in a sono-tube concrete foundation. The concrete foundation is typically three-feet to four feet in the ground. The antenna will not extend past structure. The system is designed to have the antennas mounted on the side of the pole. The maximum antenna height is five feet. The typical bungalow is a six-foot by six-foot aluminum structure. The bungalow has four drop down legs that extend eight feet below the bottom of the bungalow within four, one-foot diameter holes. Please refer to Plates 9 and 10.

Information provided by CN indicates that ground disturbance will be limited to existing, disturbed ROW. I recommend that the direct and indirect Area of Potential Effect for these structures should be limited to the footprint of construction within the ROW. The restriction of subsurface excavation to

previously disturbed areas indicates that the construction and use of these devices are unlikely to have a direct effect on buried archaeological sites. The small size and low profile of the equipment and the location of this equipment within existing ROW indicates that indirect adverse effects on historic properties are unlikely. Within these specific parameters of construction and use, HRAGP respectfully requests that additional resources consultation is not required.

If you have any questions or comments please feel free to contact me at jhughey@hragp.com or by telephone at 713-541-0473.

Regards,

James Hughey
Regional Manager
HRA Gray & Pape, LLC.

CC: Stella Karnis, CN, Senior Manager, Environmental Affairs
Luanne Patterson, CN, System Manager, Environmental Assessment
Jay Diebold, Senior Consultant, Golder Associates, Inc.

Enclosures: photograph illustrating size and location of typical structure